THE
MADRAS LAW JOURNAL
REPORTS.

EDITORIAL COMMITTEE :

DEWAN BAHADUR L. A. GOVINDARAGHAVA AIYAR, B.A., B.L.

MR. B. SITARAMA RAO, B.A., B.L.

RAO BAHADUR S. VARADACHARIAR, B.A., B.L., *Editor-in-Charge.*

MR. K. V. KRISHNASWAMI AIYAR, B.A., B.L.

„ A. KRISHNASWAMI AIYAR, B.A., B.L.

REPORTERS :

MR. K. J. RUSTOMJI, BARRISTER-AT-LAW, *Privy Council.*

„ A. S. VISVANATHA AIYAR, B.A., B.L., *High Court.*

„ C. A. SESHAGIRI SASTRI, B.A., B.L., „

„ S. PANCHAPAGESA SASTRI, B.A., M.L., „

„ N. SWAMINATHA AIYAR, B.A., M.L., „

Volume LV
July—December, 1928

PUBLISHED BY

MR. R. NARAYANASWAMI AIYAR, B.A., B.L.,

Advocate, High Court, Mylapore, Madras.

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE.

[*All Rights Reserved.*]

JUDGES OF THE HIGH COURT.

JULY—DECEMBER, 1928.

CHIEF JUSTICE :

The Hon'ble Sir Murray Coutts-Trotter, *Kt.*, M.A. (Oxon.), F.M.U. (*Barrister-at-Law*).

PUISNE JUDGES :

The Hon'ble Sir William Watkin Phillips, I.C.S. (*Bar.-at-Law*).

" Sir Calamoor V. Kumaraswami Sastriar, *Kt.* (Dewan Bahadur), B.A., B.L.

" Mr. Vepa Ramesam, B.A., B.L.

" Mr. Charles Edwin Odgers, M.A., B.C.L. (*Bar.-at-Law*).

" Mr. M. D. Devadoss (*Barrister-at-Law*).

" Mr. M. Venkatasubba Rao, B.A., B.L.

" Mr. E. H. Wallace, I.C.S.

" Mr. H. O. C. Beasley (*Barrister-at-Law*).

" Mr. D. G. Waller, I.C.S.

" Mr. C. Madhavan Nair (*Barrister-at-Law*).

" Mr. G. H. B. Jackson, I.C.S.

" Mr. H. D. C. Reilly, I.C.S., Tempy. Addl.

" Mr. C. R. Thiruvenkatachariar, B.A., B.L. (Dewan Bahadur), Tempy. Addl.

OFFICIATING JUDGES :

The Hon'ble Mr. A. J. Curgenwen, I.C.S.

" Mr. E. Pakenham Walsh, I.C.S.

" Mr. G. C. Mackay, I.C.S..

ADVOCATE-GENERAL :

The Hon'ble Mr. C. V. Ananthakrishna Aiyar, B.A., B.L.

TABLE OF CASES REPORTED.

PRIVY COUNCIL.

	Page
Ardeshir H. Mama v. Flora Sassoon, L.R. 55 I.A. 360 ..	523
Bommadevara Naganna Naidu Bahadur v. Bommadevara Rajya Lakshmi Devi Amma ..	242
Firm Chhunna Mal Ram v. Firm Mool Chand Ram Bhagat, L. R. 55 I. A. 154 ..	1
Gauri Nath Kakaji v. Mt. Gaya Kuar, L.R. 55 I.A. 399 ..	339
Guran Ditta v. Ram Ditta, L.R. 55 I.A. 235 ..	651
Hitendra Singh v. Sir Rameshwar Singh Bahadur, L.R. 55 I.A. 197 ..	615
Hongkong and Shanghai Banking Corporation v. Lo Lee Shi ..	627
Jaigobind Pandey v. Ramanandan Sahai ..	56
The Karnani Industrial Bank, Limited v. Satya Niranjan Shaw, L.R. 55 I.A. 344 ..	464
Kesho Prasad Singh v. Madho Prasad Singh ..	251
Kishan Singh v. King-Emperor ..	786
Kumar Kamakhya Narayan Singh v. Ram Raksha Singh, L. R. 55 I. A. 212 ..	882
Kunwar Jang Bahadur v. The Bank of Upper India, Ltd., Lucknow, L. R. 55 I. A. 227 ..	545
W. E. A. Macauley v. The Judges of the Supreme Court of Sierra Leone ..	296
Maung Ba Pe v. Maung Shwe Ba, 6 R. 520 ..	95
Motilal v. Thakur Ujiar Singh, L. R. 55 I. A. 207 ..	81
Mussammat Vaishno Ditti v. Mussammat Rameshri, L.R. 55 I. A. 407 ..	746
Muthiah Chetti v. Palaniappa Chetti, L. R. 55 I. A. 256: I. L. R. 51 Mad. 349 ..	122
Narsingh Rao v. Mahalakshmi Bai, L. R. 55 I. A. 180 ..	42
Nawab Sadiq Ali Khan v. Jai Kishori ..	88
Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd., L.R. 55 I.A. 274: I.L.R. 52 Bom. 571 ..	697
Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd. ..	711
Rajah Bejoy Singh v. Surendra Narayan Singh, L. R. 55 I. A. 320 ..	456

PAGE

Raja of Bobbili v. Ayyagari Sodemma .. 302
Ramgopal v. Dhanji Jadhavji Bhatta, L. R. 55 I. A. 299: I. L. R. 55 Cal. 1048 .. 248
Ramkisan Singh v. Md. Abdul Sattar .. 292
Ruhulla v. Hassanalli Degumia .. 84
Sakalaguna Nayudu v. Munuswami Nayakar, L. R. 55 I. A. 243: I. L. R. 51 Mad. 533 .. 198
Secretary of State for India v. Ramanujachariar, L. R. 55 I. A. 331: I. L. R. 51 Mad. 611 .. 281
Secretary of State for India v. Volkart Brothers, L. R. 55 I. A. 423: I. L. R. 51 Mad. 885 .. 646
Tewari Raghuraj Chandra v. Rani Subhadra Kunwar .. 778
Thakur Ashutosh Deo Ghatwal v. Bansidhar Shroff, L. R. 55 I. A. 249: I. L. R. 7 Pat. 744 .. 7

HIGH COURT—FULL BENCH.

Baluswami Aiyar, *In the matter of*, I. L. R. 51 Mad. 417 .. 175
The Collector of Vizagapatam v. Krishna Chandra Kharasudha Patnaik .. 584
Commissioner of Income-tax, Madras v. Alagannan Chetty. 66
Commissioner of Income-tax, Madras v. A. L. A. R. Brothers, Devakotta .. 600
Commissioner of Income-tax, Madras v. Karuppiah Kangani .. 844
Commissioner of Income-tax, Madras v. Pethaperumal Chettiar .. 850
Commissioner of Income-tax, Madras v. Subramaniam Chettiar, I. L. R. 51 Mad. 787 .. 416
Commissioner of Income-tax, Madras v. Thiruvengada Mudaliar .. 19
Krishna Rao, *In re*, I.L.R. 51 Mad. 540 .. 171
Krishnayya Rao v. Rajah of Pittapur, I.L.R. 51 Mad. 893. 894
Narayanaswami Naicker v. Sakharam Rao .. 838
Penmetcha Subbaraju v. Penmetcha Venkataramaraju, I. L. R. 51 Mad. 800 .. 429
Perumal Pillai v. Perumal Chetty, I. L. R. 51 Mad. 701 .. 253
The powers of the newly enrolled Statutory Advocates, *Re*. 551
The Public Prosecutor v. Ponnuswami Nayak .. 674
Raghunatha Patro v. Govinda Patro .. 798
Second Grade Pleader, Gudalur, *In re*, I.L.R. 51 Mad. 798. 170
Thimmappa v. Timmappa, I. L. R 51 Mad. 967 .. 351
Veerappa Chettiar v. Subramania Aiyar .. 794
Veerappa Goundan, *In re*, I. L. R. 51 Mad. 956 .. 591
Visvanadha Rao, *In re*, I. L. R. 51 Mad. 1006 .. 442

OTHER CASES.

PAGE

Abdul Khuddus Sahib v. Ashroof Sahib, I. L. R. 51 Mad. 522 .. 40
Abdul Rahiman Sahib & Co., *In re*, I. L. R. 51 Mad. 308.. 12
Akkayya v. Lakshmamma, I. L. R. 51 Mad. 849 .. 517
Andi Thevan v. Nagayasami Chettiar .. 369
Avadai Ammal v. Krishnan Chetty, I. L. R. 51 Mad. 858 .. 497
Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Goverdhandoss .. 132
Balakrishna Menon v. Kakkat Manakkal Uma .. 873
Chairman, Municipal Council, Chidambaram v. Thirunarayana Aiyangar, I. L. R. 51 Mad. 876 .. 566
Chandu Kutti v. Viayathen Mahadevi .. 450
Chellapathi Naidu v. Subba Naidu .. 693
Chengalamma Garu v. Veeraraghava Naidu, 55 M.L.J. 506. 506
Chinna Alagumperumal Karayalar v. Vinayagathammal .. 861
Chinna Brahmayya v. Pappusetty Gangulu, I. L. R. 51 Mad. 695 .. 33
Chockalinga Pandaram, *In re* .. 117
M. E. D'Cruz v. Nagiah Naidu .. 683
Damodharam Chetty v. Bansilal Abeerchand, I. L. R. 51 Mad. 711 .. 471
Dasarratharama Reddi v. Narasa Reddi, I. L. R. 51 Mad. 484 .. 109
The East India Distilleries and Factories, Limited v. P. F. Mathias, I. L. R. 51 Mad. 994 .. 663
Gnanambal, *In re* .. 516
Goculdoss Jumnadoss & Co. v. Sadasivier .. 671
Hassan Kutti Beary v. Jainabha .. 828
Jumna Bai v. Ramanathan Chettiar .. 690
Kodali Tiruvengadaratnam v. Kodali Butchayya .. 757
Kutbudeen Sahib v. Periyanayaga Padayachi, I. L. R. 51 Mad. 491 .. 114
Lanka Sanyasi v. Lanka Yerran Naidu, I. L. R. 51 Mad. 763 .. 374
Local Fund Overseer, Mayavaram v. Pakkirisami Thevan, I. L. R. 51 Mad. 527 .. 213
Machanjeri Ahmed v. Govinda Prabhu, I. L. R. 51 Mad. 862 .. 661
Mahalakshmamma v. Suryanarayana, I. L. R. 51 Mad. 977. 733
Mangala Goundar v. Ayyathorai Mudaliar .. 632
Mannen Venkayya, *In re* .. 712
Maridu Gopayya, *In re*, I. L. R. 51 Mad. 866 .. 27
Moideen Rowthen v. Miyyassa Pulavar, I.L.R. 51 Mad. 777 .. 444

	PAGE
Moithiyan Kutti v. Mammali, I. L. R. 51 Mad. 574 ..	208
Moliappa Goundan, *In re* ..	715
Muhammad Salia Rowther, *In re* ..	624
Municipal Council, Chidambaram v. Subramania Aiyar ..	495
Mt. Amir Bi v. Abdul Rahim Sahib ..	266
Muthu Chettiar v. Narayanan Chettiar, I. L. R. 51 Mad. 672.	274
Muthukaruppa Servai, *In re* ..	626
Muthukrishna Pillai v. Ayyasami Aiyar ..	382
Muthuswami Kavundan v. Ponnayya Kavundan, I. L. R. 51 Mad. 815 ..	436
Nagaraja Moopanar, *In re*, I. L. R. 51 Mad. 504 ..	320
Nanjundan Chettiar v. Nallakaruppan Chettiar ..	120
Narayana Reddi v. Audilakshmi Ammal, I. L. R. 51 Mad. 462 ..	102
Natesa Vannian v. Gopalasami Mudaliar, I. L. R. 51 Mad. 688 ..	151
The Official Assignee of Madras v. Ranganayaki Ammal..	38
The Official Receiver, Anantapur v. Ramachandrappa ..	721
Paidimarri Mahalakshmamma v. Chaturvedulu Suryanarayana ..	733
Palaniandi v. Veyilamuthu Pillai ..	579
Parameshwaram Nambudripad v. Seshan Pattar, I. L. R. 51 Mad. 583 ..	156
Pasuvathia Pillai, *In re*, I. L. R. 51 Mad. 873 ..	220
Pattabirami Reddi v. Kamisetty Balliah ..	574
Pitchayya v. Rattamma ..	856
President, District Board, Anantapur v. Ismail Sahib, I. L. R. 51 Mad. 512 ..	204
The President, Union Board, Tirukurangudi v. Narayana Nadar ..	718
The Public Prosecutor v. Budipiti Devasikamani ..	228
The Public Prosecutor v. Chidambaram ..	231
The Public Prosecutor v. Podimonu Beary ..	499
The Public Prosecutor v. Ramayya Mudaliar ..	573
V. Purushothamdoss & Bros., *In the matter of* ..	657
Raghupathi Aiyar v. Narayana Goundan ..	767
Rajagopala Aiyangar v. Srinivasa Raghava Aiyangar, I. L. R. 51 Mad. 627 ..	30
Raja Rajeswari Sethupathy v. Muthudayana Pillai ..	379
Rajah of Ramnad v. The Secretary of State for India in Council ..	770
Ramachandra Dikshidar v. Narayanaswami Reddiar, I. L. R. 51 Mad. 810 ..	326
Ramakottiah v. Subba Rao ..	576
Ramalinga Odayar, *In re*, I. L. R. 51 Mad. 610 ..	217

PAGE

Ramaswami Chettiar v. Tyagaraja Pillai, I. L. R. 51 Mad. 472 .. 34
Ramathai Anni v. Kanniappa Mudaliar, I. L. R. 51 Mad. 495 .. 235
Ranga Reddi v. Chinasidda Reddi .. 78
Rangaswami Goundan, *In re* .. 503
Rani Kulandai Pandichi v. Ramaswami Pandia Thevan, I. L. R. 51 Mad. 664 .. 345
Ratansi D. Morarji v. The Administrator-General of Madras .. 478
Sambamurthi Aiyar v. Ramakrishna Aiyar .. 837
Sami Vannia Nainar v. Periaswami Naidu, I. L. R. 51 Mad. 603 .. 218
Sarareddi v. Brahmayya .. 586
Selvarayan Samson v. Amalorpavanadham .. 262
Shariba Beebi v. Abdul Salam, I. L. R. 51 Mad. 860 .. 565
Srinivasam Pillai v. Rukmini Ammal .. 330
Subbarayadu v. Venkataratnam, I. L. R. 51 Mad. 632 .. 314
Subba Reddi v. Venkatasubba Reddi, I. L. R. 51 Mad. 755. 72
Subramania Aiyar, *In re* .. 676
Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd. .. 385
Taranagowd, *In re*, I.L.R. 51 Mad. 515 .. 24
Thanmul Sowcar v. Ramadoss Reddiar, I. L. R. 51 Mad. 648 .. 358
Thiruvengadaswami Aiyangar v. Govindaswami Udayar, I. L. R. 51 Mad. 655 .. 363
Unikanta Menon v. The Board of Commissioners for the Hindu Religious Endowments, Madras .. 679
Vaduga Kumara Nadar, *In re*, I. L. R. 51 Mad. 524 .. 206
Vedappan Servai v. Periannan Servai .. 621
Venkatachalam Chettiar v. Annapurni Ammal .. 223
Venkata Hanumantha Rao v. Gangayya, I. L. R. 51 Mad. 594 .. 168
Venkatapathi Nayakar v. Pappia Nayakar, I. L. R. 51 Mad. 824 .. 489
Venkatram v. Chockkier, I. L. R. 51 Mad. 567 .. 163
Venkayya, *In re* .. 712
Vijiaraghavachariar v. Ramanujachariar .. 859
Sri Vythilinga Pandarasannadhi v. Sir T. Sadasiva Aiyar .. 605

TABLE OF CASES CITED.

A

PAGE

Abaji Sitaram Modak v Trimbak Municipality, (1903) I L R 28 B 66 .. 6
Abbas Ali Chowdhry v. Illim Meah, (1870) 14 W R (Cr) 46 .. 623
Abbott v Middleton, (1858) 7 H L C 68 .. 688
Abdul Aziz Khan v. Appayyasami Naicker, (1903) I L R 27 M 131: 31 I A 1 (P C) .. 582
Abdul Hussain v. Kasi Sahu, (1900) I L R 27 Cal 632 .. 350
Abdul Hussein v Mahomedally Adamji, (1921) I L R 46 Bom 772 272
Abdul Hussein Khan v. Bibi Sona Dero, (1917) L R 45 I A 10: I L R 45 C 450: 34 M L J 48 (P C) .. 755
Abdul Karim v. Municipal Officer, Aden (1903) I L R 27 Bom 575. 824
Abdul Karim Fateh Mahomed v. Municipal Officer, Aden, (1903) I L R 27 Bom 575 .. 807, 815
Abdul Karim Sahib v Badrudeen Sahib, (1904) I L R 28 Mad 216. 271, 273
Abdul Khader v The Official Assignee of Madras, (1916) I L R 40 M 810 164, 171, 172, 173
Abdul Khadir v. Ahammad Shiwa Ravuthar, (1913) I L R 38 Mad 419 .. 161
Abdul Rahman & Co v. Shaw Wallace & Co., (1924) 21 L W 516. 876, 880
Abdul Rahiman Sahib & Co., *In re,* (1926) I L R 51 Mad 308 at 317: 55 M L J 12 .. 878
Abdul Wahid Khan v. Shalukhra Bibi, (1893) I L R 21 C 496: L R 21 I A 26 (P C) .. 439
Abdur Rahman v. Abdur Rahman, (1925) I L R 47 All 513 (F B). 816
Abhai Churn v. Mangul, (1892) I L R 19 Cal 634 .. 146
Abhiram Goswami v. Shyama Charan Nandhi, (1909) L R 36 I A 148: 19 M L J 530 (P C) .. 462
Abraham v. Abraham, (1863) 9 M I A 195 .. 487
Acha v. Sankaran, (1926) 50 M L J 497 .. 348, 349
Adams v. Great North of Scotland Railway Co., (1891) A C 31 .. 389, 407
Adhar Chandra v. Kirtibash Biramjee, (1910) 12 C L J 586 .. 872
Adinarayana Reddi v. Subbarayadu Reddi, (1927) 104 I C 621 .. 495
Adusimilli Krishnayya v. Adusimilli Lakshmipathi, L R 47 I A 99: I L R 43 M 650: 39 M L J 70 (P C). 912, 932, 937, 938
Agriculturist Cattle Insurance Co., *In re*: Official Manager, *Ex parte,* (1874) 10 Ch App 586 .. 877
Ahmad Khan v. Channi Bibi, (1925) L R 52 I A 379: I L R 6 Lah 502 (P C) .. 756
Ahmad Wali Khan v. Shams-ul-Jahan Begam, (1906) L R 28 A 482: 33 I A 81 · 16 M L J 269 (P C) .. 327
Alagu Pillai v. Mayila Pillai, (1923) 45 M L J 76 .. 433
Alamelumanga v. Namberumal, (1914) 15 M L T 352 .. 145
Aldrich v. Cooper, (1803) 8 Vessey (Junior) 382 .. 361
Alexandar v. Bridge Allan Water Co., 7 Court Sess. Cas. 3rd Series (Macph.) 492 .. 407
Ali Bahadur Beg v. Rafiullah, (1926) I L R 49 All 310 .. 259

PAGE
Allen Bros Co. v. Bando & Co., (1922) I L R 49 Cal 931 .. 807, 813, 815, 816
Amar Chandra Banerjee v. Guru Prosunno Mukerjee, (1900) I L R 27 Cal 488 .. 550
Amar Chand Samaria v. Banwari Lall Rakshit, (1921) I L R 49 C 608 .. 431, 433
Amba *alias* Padmavati v. Srinivasa Kamathi, (1921) 26 C W N 369 (P C). 106, 108, 109
Ambayara Goundan v. Pachamuthu Goundan, (1923) 19 L W 461. 717
Anderson, *Ex parte*, (1870) L R 5 Ch A 473 .. 165
Angerstoin, *Ex parte*: Angerstoin, *In re*, (1874) 9 Ch App 479 .. 876, 877, 880
Anne Brahmayya v. Chelasany Rattayya, (1924) 20 L W 503 .. 990, 991, 997
Annoda Prasad Banerjea v Nobo Kishore Roy, (1905) I L R 33 Cal 560 .. 173
Appanna v. Latchayya, (1923) I L R 47 M 250: 45 M L J 735.. 799, 800 805, 812, 826
Appa Rao v. Gurraju, (1920) I L R 43 Mad 859: 39 M L J 476.. 380
Appavu v. Seeni, (1916) I L R 41 Mad 115: 33 M L J 177 .. 436
Appuvier v. Ramasubba Aiyan, (1866) 11 M I A 75 .. 139
Arthur Williams & Co, *In re*: The Official Receiver, *Ex parte*, (1913) 2 K B 88 .. 375
Arukapalli Narasimha Rao v. Arumalli Subbarayudu, (1926) 51 M L J 135 .. 366
Arumuga Tegundan v. Rajendra Narayan Bagachi, (1902) I L R 26 Mad. 188 .. 695
Asgar Ali Chowdhry v. Muhubut Ali, (1874) 22 W R 403 .. 836
Ashutosh Dutt v. Doorga Churn Chatterjee, (1879) 6 I A 182: I L R 5 C 438 (P C) 687
Attorney-General v. Cory Bros. & Co., (1921) 1 A C 521 .. 670
Attorney-General v Drummond, (1842) 1 Dr & War 353 .. 137
Attorney-General v. Dussley, Craies on Statute Law, p. 336, 3rd Ed. .. 384
Ayyannamma v. Ramaswami, (1927) 53 M L J 444. 430, 431, 433
Ayyareddi v. Gopalakrishnayya, (1923) I L R 47 Mad 190: 51 I A 140. 46 M L J 164 (P C) .. 328
Ayyathorai Mudaliar v. Mangala Goundar, (1927) 53 M L J 735. 634
Ayimuddy v. Emperor, (1926) I L R 54 Cal 237 .. 357

B

Badeley v Consolidated Bank, (1886) L R 38 Ch D 238 .. 17
Bahadur Singh v The Crown, (1926) I L R 7 Lah 264 357
Bai Gulab v. Jiwanlal Harilal, (1921) I L R 46 B 871 .. 487
Baij Nath Prasad v. Narain Prasad, (1927) 102 I C 608 .. 431, 434
Bai Kesar v. Bai Ganga, (1871) 8 Bom H C R (Ap C) 31 .. 864
Bai Kashi v. Jamna Das, (1912) 14 Bom L R 547 .. 487
Bakhtawar Singh v. Sant Lal, (1887) I L R 9 A 617 (F B) .. 564
Bala Bax v. Rukhmabai, (1902) L R 30 I A 130: I L R 30 C 725 (P C) .. 147, 150
Balagodul Veerabadra Gowd v. Kalyani Gangamma, (1926) 97 I C 465 .. 433
Balakrishna Daji v Collector of Bombay Subarban, (1923) I L R 47 Bom 699 .. 816

PAGE
Balappa v. Chanbasappa, (1915) 17 Bom L R 1134 .. 871
Balavenkata Seetharama v. Official Receiver, Tanjore, (1926) I L R 49 Mad 849: 51 M L J 269 (F B) .. 183
K. Bali Reddi and others, *In re*, (1913) I L R 37 Mad 119 .. 791
Balkishen v. Ram Narain, (1903) L R 30 I A 139: I L R 30 C 738 (P C) .. 136
Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmamma; Radha Mohun v. Hardai Bibi, I L R 22 M 398 at 408: 9 M L J 67 (P.C) .. 909
Balwant Singh v. Daulat Singh, (1886) I L R 8 All 315: L R 13 I A 57 (P C) .. 336
Balwant Singh v Kishori, (1898) L R 25 I A 54: I L R 20 A 267.. 49
Bandhu Ram v. Ramkishun Sonar, (1923) 21 A L J 354 .. 474
Bapu Daldi v. The Queen, (1882) I L R 5 M 23. 500, 501, 502
Barkatullah Khan v. Rannie, (1875) I L R 1 All 17 .. 185
Barraclough v. Brown, (1897) A C 615 .. 641
Basava Sankaran v Anjaneyalu, (1926) I L R 50 M 135: 51 M L J 529 (F B) .. 165
Beg v. Allah Ditta, (1916) L R 44 I A 89: I L R 44 C 749: 32 M L J 615 (P C) .. 756
Behari Lal Mullick, *In re*, (1927) I L R 54 Cal 630 .. 848
Benode Behari Bose v Nistarani Dassi, (1905) L R 32 I A 193: I L R 33 Cal 180: 15 M L J 331 (P C) .. 272
Benzon, *In re*: Bower v. Chetwynd, (1914) 2 Ch 68 .. 662
Bhagwan Das Khettry v Nilkanta Ganguli, (1904) 9 C W N 171. 255
Bhasba Rabidat v Indar Kunwar, L R 16 I A 53: I L R 16 Cal 556 (P C). 913, 926, 970, 990, 1004
Bhatu Ram Modi v. Fogal Ram, (1925) I L R 5 Pat 223 .. 258
Bhugwandeen Doobey v. Myna Baee, (1867) 11 M I A 487 .. 342, 343
Bhutnath Jana v. Tara Chand Jana, (1920) 25 C W N 595 .. 259
Bhyrub Chunder Chunder v. Shama Sundaree Debea, (1913) I L R 40 Cal 518 .. 814
Binda Kuar v. Bhonda Das, (1885) I L R 7 A 660 .. 439
Bipeen Behari Chowdhury v. Ram Chunder Roy, (1870) 14 W R 12. 858
Birendra Kishore Manikya v Secretary of State for India, (1920) I L R 48 Cal 766 .. 807
Bodachari v. Muniyachari, (1921) 14 L W 666 .. 431, 433
Borneman v. Wilson, (1884) 28 Ch D 53 .. 878
Bowers v. Shand, (1877) L R 2 A C 455 .. 5
Bradshaw v. Warlow, (1886) 32 Ch D 403 .. 841, 844
Brij Narain v Mangal Prasad, (1923) 51 I A 129: I L R 46 A 95 (P C) .. 187
Brown's Case, (1921) 2 A C 222 .. 849
Bryant, *In re*: Gordon, *Ex parte*, (1889) 6 Morr Bank Cas 262 .. 877
Bull & Co. v. West African Shipping Co., (1927) A C 686 .. 645
Burmah Trading Corporation, Ltd. v. Mirza Mahomed Ali, (1878) L R 5 I A 130 .. 590

C

Candas Narrondas, *In the matter of*, (1889) I L R 13 B 520 .. 173
Chaiton Patgosi Mahapatra v. Kunja Behari Patnaik, (1911) I L R 38 Cal 832. 802, 813, 814
Chakkantavida Chakkan Abdulla v Thazhath Cheekkootti, (1910) I L R 34 M 245: 20 M L J 368 .. 209

PAGE

Chakra Kannan v. Kunhi Pokker, (1915) I L R 39 M 317: 29 M L J 481 (F B). 209, 210, 212, 213
Chakrapani v. Varahalamma, (1894) I L R 18 M 227 .. 585
Chanbasappa v. Baslingayya, (1927) I L R 51 B 908: 29 Bom L R 1254 (F B). 431, 433, 434
Chandi Pershad v. Abdur Rahaman, (1894) I L R 22 Cal 131 .. 717
Chandra Pandey v. Rajendra Narain Bagachi, (1902) I L R 26 Mad 188 .. 695
Chandra Shekhar v. Amir Begam, (1927) I L R 49 All 592 .. 258
Chandrika Ram Kahar v. King-Emperor, (1922) I L R 1 Pat 401 .. 234
Chapman v. Day, (1838) 48 L T 907 .. 260, 261
H D. Chatterjee v. L. B. Tribedi, (1921) I L R 49 Cal 528 .. 814
Chajju Ram v. Neki, (1922) I L R 3 Lah 127: 49 I A 144: 43 M L J 332 (P C). 331, 334, 335
Chidambara Chettiar v. Parvathi Achi, (1924) 87 I C 351 .. 37
Chidambaramma v. Hussainamma, (1915) I L R 39 M 565: 29 M L J 546 .. 861
Chief Commissioner of Income-tax v. Zamindar of Singampatti, (1922) I L R 45 Mad 518 (F B) 772, 773, 775
Chinnaswami Pillai v. Pavayee Ammal, (1927) 102 I C 877 .. 349
Chinna Venkatasami Naicken v. Venkatasami Naicken, (1919) I L R 42 Mad 625: 36 M L J 291 .. 433
Chinnayya Goundar, *In re*, (1921) 41 M L J 577 .. 813
Chintalapalli Chinna Dorayya v Chintalapalli Venkanna, (1923) 76 I C 502 .. 433
Chiruvolu Punnamma v. Chiruvolu Perrazu, I L R 29 Mad 390: 16 M L J 307 (F B) .. 943
Chittammal v. Ponnuswami Naicker, (1925) I L R 49 M 762: 50 M L J 180 .. 166
Choudhuri Ganesh v. Mussamat Jewach, (1903) L R 31 I A 10: 14 M L J 8 (P C) .. 149
City of London Contract Corporation, Ltd. v. Styles, (1887) 2 Tax Cases 239 .. 70
Clarke v Brojendra Kishore Roy Chowdhry, (1912) 39 I A 163: I L R 39 C 953: 23 M L J 32 (P C) .. 624
Clarke v. Staneford, (1871) L R 6 Q B 357 . 216
Clayton's Case, (1816) 1 Mer 572: 35 E R 781 .. 476
Clifton v. Walmesley, (1794) 5 T R 564 .. 136
Clough v. L. & N W. R, (1871) L R 7 Ex 26 .. 540
Collector of Madura v. Muthu Ramalinga Sethupathy, 12 M I A 397. 909, 911, 936, 937, 973, 1002, 1003
The Collector of Madura v. Muthu Ramalinga Sethupathy, (1868) 12 M I A 397. 909, 911, 936, 937, 973
The Collector of Thana v. Bhaskar Mahadev Seth, (1884) I L R 8 Bom 264 .. 816
Colonial Sugar Refining Company v. Irving, (1906) A C 360 .. 609
Convey v. Fenton, (1888) 40 Ch D 512 .. 521
"Countess of Warwick" Steamship Co. v. Ogg, (1924) 8 Tax Cases 652 .. 71
Cox v. Hickman, (1860) 8 H L 268 .. 16
The Crown v. Salig Ram, (1926) I L R 7 Lah 303 .. 119

D

Dagree v. Pacotti Sanjao, (1895) I L R 19 B 783 .. 482
Dakhina Mohan Roy v. Saroda Mohan Roy, (1893) I L R 21 C 142: 20 I A 160 (P C) .. 440

PAGE

Darbari Panjara v. Bhotı Roy, (1914) I L R 41 Cal 915 .. 816, 827
Dattatraya Sakharam v. Govind Sambhaji, (1916) I L R 40 B 429. 785
Davidson v. Cooper, (1844) 13 M & W 343 .. 631
Dayaram v. Sohel Singh, 1906 P R 390 .. 755
Devasigamony v. Sethuratna Aiyar, (1924) 87 I C 363 .. 643
Devi Prasad v Secretary of State for India, (1923) I L R 45 A 557. 40
Dhanraj Bhagat v. Bharat Narain Singh, (1924) 84 I C 324 .. 624
Dilet, *In re*, (1887) 12 App Cas 459 .. 793
Dinkar Hari v. Chagan Lal Narsidas, (1913) I L R 38 B 177.. 508
Dinobandhu Shaw Chowdhury v. Jogmaya Dasi, (1901) I L R 29 C 154: 29 I A 9: 12 M L J 73 (P C). 371, 372, 373
Dodda Sannekappa v Sakravva, (1916) 36 I C 831 .. 347, 348
Doe v Earl of Derby, (1834) 1 Ad & El 783: 110 E R 1406 .. 900
Doe dem Blomfield v. Eyre, (1848) 5 C B 713: 136 E R 1058 .. 55
Doleman & Sons v Ossett Corporation, (1912) 3 K B 257 .. 436
Doraisami Aiyar v. Balasundaram Aiyar, (1926) 52 M L J 477 .. 566
Doraisami Serumadan v. Nondisami Saluvan, (1912) I L R 38 M 118 · 23 M L J 405 (F B) .. 31, 32
Doughty v. Bowman, (1848) 11 Q B 444: 116 E R 543 .. 154, 155
Durgahi v. Emperor, (1924) I L R 52 C 499 .. 234

E

Easy, *In re*, (1887) 19 Q B D 538 .. 238
Emperor v. Angnu Singh, (1922) I L R 45 A 109 .. 27
Emperor v. Chellan, (1905) I L R 29 M 91 .. 592
Emperor v. Daulat Kunjra, (1902) 6 C W N 921 .. 234
Emperor v. Dhananjoy Raha, (1923) I L R 51 Cal 347 .. 593
Emperor v. Gholam Khadar, (1924) 28 C W N 876 .. 593, 594
Emperor v Har Mohan Das, (1927) I L R 54 Cal 708 .. 593
Emperor v. Indu Bhusan Sarkar, (1926) I L R 53 Cal 524 .. 772
Emperor v. Kampu Kuki, (1902) 11 C W N 554 .. 234
Emperor v. Maung Tha Dın, (1926) I L R 4 Rang 72 (F B).. 353, 355
Emperor v. Nilkanta, (1912) I L R 35 Mad 247: 22 M L J 490 (F B) .. 353, 354
Emperor v. Probhat Chandra Barua, (1924) I L R 51 Cal 504 .. 772
Emperor v Probat Chandra Barua, (1927) I L R 54 Cal 863 (F B). 772
Emperor v. Sanadal Lallu Bai, (1913) I L R 37 Bom 658 .. 504
Emperor v Sheodarshan Singh, (1922) I L R 44 A 332 .. 792
Emperor v. Shivputraya Durdandaya, (1924) I L R 48 Bom 510 .. 792
Emperor v. Varjiwandas, (1902) I L R 27 Bom 84 .. 676
Emperor v. Vithu Balu Kharat, (1924) 26 Bom L R 965 .. 353, 357
Empress v. Abdul Kadir, (1880) I L R 3 A 279 (F B) .. 504
Empress v. Burah, (1878) I L R 4 Cal 172: L R 5 I A 178 (P C). 607
Empress v. Ram Lal Singh, (1883) I L R 6 A 40 .. 675
Essafally v. Abdeali, (1920) I L R 45 Bom 7 .. 270

F

Fakirchand Motichand v. Motichand Hurrakchand, (1883) I L R 7 Bom 438 723, 728, 729
Fanındra Deb v Rajeswar Dass, (1885) 12 I A 72: 11 Cal 463 (P C) .. 483
S. M. A. R. A. L. Firm v. R. M. M. A. Firm, (1927) I L R 5 Rang 772 .. 795

PAGE
Firozi Begam v. Abdul Latif Khan, (1908) I L R 30 All 143 .. 334, 336
Fletcher v Rylands, (1866) L R 1 Ex 265 .. 669
Flint v. Howard, (1893) 2 Ch 54 .. 360
Frome United Breweries Co. v. Bath Justices, (1926) A C 586.. 682

G

Gajapathi Radhamani v. Pusapati Alakarajeswari, (1892) L R 19 I A 184: I L R 16 Mad 1 (P C) .. 343, 345
Gajendra Singh v. Durga Kunwar, (1925) I L R 47 A 637 (F B). 431, 434
Galey, In re: Cundy, Ex parte, (1890) 7 Morr Bank Cas 253 .. 878
I A 134: I L R 5 Pat 585: 51 M L J 82 (P C) .. 508, 509, 510, 511, 513, 514, 515
513, 514, 515
Ganga Dayal v. Mani Ram, (1908) I L R 31 All 156 .. 32
Gansa Oraon v. King-Emperor, (1923) I L R 2 Pat 517 .. 234
R. Gilbert, Ex parte, (1892) I L R 16 Bom 398 .. 389
Girdhari Singh v Megh Lal Pandey, (1917) L R 44 I A 246: 33 M L J 687 (P C) .. 462
Girish Myte v. Queen-Empress, (1896) I L R 23 Cal 420 .. 504
Pirja Bai v. Sadashiv Dhundiraj, (1916) L R 46 I A 151: I L R 43 Cal 1031: 31 M L J 455 (P C) .. 191, 744
Glanville, In re: The Trustees, Ex parte, (1885) 2 Morr Bank Cas 71 .. 877
Gobind Kumar Chowdry v. Kisto Kumar Chowdry, (1867) 7 W R 520 (F B). 801, 813, 814
Gobindu Nath Doss v. Nitya Kali Dasi, (1919) 51 I C 581 .. 349
Gokaldas Gopaldas v. Purammal Premsukhdas, (1884) I L R 10 Cal 1035: 11 I A 126 (P C) .. 372
Goljan Bibi v. Nagar Ali, (1917) 28 C L J 163 .. 335
Gopal v Ramachandra, (1902) I L R 26 Bom 597 .. 260, 261
Gopala Aiyangar v. Ibrahim Rowther, (1925) I L R 48 Mad 509: 49 M L J 606 (F B) .. 643
Gopala Aiyangar v. Mummachi Reddiar, (1922) 17 L W 254 .. 440
Gopal Chunder v. Kenaram, (1867) 7 W R 35 .. 145
Gopanna Mannadiar v. Palani Goundan, (1925) M W N 489 .. 801, 812, 813, 826
Gottukkula Surappa Raju v Gottukkula Venkayya, (1915) M W N 908 .. 31, 32
Grace v. Smith, (1775) 2 Wm Bl 998 .. 16
Greening v. Wilkinson, (1825) 1 C & P 625 .. 590
Greenville Smith v. Tomlin, (1911) 2 K B 9 .. 645
Guimoni Dasi v. Tarini Charan Porel, (1927) 104 I C 360 .. 433
Gurran Siddugadu, In re, 1 Weir 492 .. 769
Gurnarayan v. Sheo Lal Singh, (1918) L R 46 I A 1: I L R 48 Cal 566: 36 M L J 68 (P C) .. 858, 859

H

Hardy, In re: Hardy v. Farmer, (1896) 1 Ch 904 .. 238
Harford v. Linskey, (1899) 1 Q B 852 .. 642
Hari Bhabini Debi v. Narendra Nath Roy, (1922) 67 I C 883 .. 334, 335
Hari Das Sanyal v. Saritulla, (1888) I L R 15 Cal 608 (F B) .. 675
Harilal Ranchhod v. Gordhan Keshav, (1927) I L R 51 Bom 1040 .. 867, 872
Hari Prasad v. Soogni Devi, (1921) 3 Lah L J 162 .. 431, 433

PAGE

Hari Telang v. Queen-Empress, (1900) I L R 27 Cal 781 .. 26
J. H. Hechle v. S J. Tellery, (1900) 14 C W N 521 .. 668
Hill v. Cooke Hill, (1916) W N 61 (Eng) .. 876
Hindley v. Joynarain Marwari, (1919) I L R 46 Cal 962 .. 39
Hindustan Assurance Mutual Benefit Society, Ltd. v. Rail Mulraj, (1914) 27 M L J 645 .. 672
Hipgrave v Case, (1885) 28 Ch D 356 527, 541, 543
Hooper v. Mayor and Corporation of Exeter, (1887) 56 L J Q B (N S) 457 .. 776
Howard v. Earl of Shrewsbury, (1874) 17 Ex 378 .. 740
Humbhreys v. Pansam, (1836) Mys and Cr 580 · 40 E R 498 .. 900, 942
Hunooman Pershad Pandey v. Mt. Babooe Munraj Kunwari, (1856) 6 M I A 421 .. 185

I

Imambandi v. Mutsaddi, (1918) I L R 45 Cal 878: 35 M L J 422 (P C) .. 37
Imbichi Beevi Umma v. Raman Nair, (1919) L R 42 I A 869: 37 M L J 220. 209, 210, 213
Imbichi Mamad v. Manavikramasamathripad, (1896) 7 M L J 211. 440
Iyathurai Aiyar v Kuppamuthu Padayachi, (1918) 9 L W 120 .. 329

J

Jadu Nath Belel v. Raj Narain Mukerjee, (1912) 17 C W N 459. 892
Jagabhai Lalubhai v. Vijbukhandas Jagjivandas, (1886) I L R 11 Bom 37 .. 728, 729
Jagannatha Rao v. Viswesam, (1924) I L R 47 Mad 621: 46 M L J 590. 177, 179, 180, 183, 184, 187, 191, 196
Jagdip Pandey v. Taibunnissa, (1923) 72 I C 397 .. 37
Jag Prasad v. Mussamat Singari, (1924) 49 M L J 162 (P C).. 146
Jai Narain Singh v. Munna Lal, (1927) 26 A L J 268 .. 344
James Bevis v. C. A Turner, (1883) I L R 7 Bom 484 .. 875, 880
Jangi Singh v. Chander Mal, (1908) I L R 30 All 388 .. 508
Jasoda Koer v. Sheo Pershad, (1889) I L R 17 Cal 33 .. 146
Jatti v. Banwari Lal, (1923) L R 50 I A 192: 45 M L J 355 (P C). 146
Jawahir Singh v. Udai Parkash, (1925) I L R 48 A 152: 50 M L J 344 (P C) .. 31, 32
Jogodindra Nath v. Sarat Sundari Debi, (1891) I L R 18 Cal 322. 350
John Smith & Son v. Moore, (1921) 2 A C 13 .. 70
John Thompson, *In the matter of,* (1870) 6 Beng L R 180 .. 822
John Tweedle & Co., Ltd., *In re,* (1910) 2 K B 697 .. 875
Jone Turner, *In the goods of,* (1886) 12 P D 18 .. 731
Joseph Vathiar of Nazareth, *In re,* (1872) 7 M H C R 121 .. 482

K

Kaikhusru Nusserwanji v. Tata Industrial Bank, Ltd., (1924) I L R 48 Bom 471 .. 709
Kakerla Chukkamma v. Kakerla Punnamma, (1914) 28 M L J 72. 761
Kali Bakhsh Singh v. Ram Gopal Singh, (1913) L R 41 I A 23: 26 M L J 121 (P C) .. 88
Kaliba Movulvija Muhammad Usan Kadiri Abkan Sahib v. Soran Bivi Saiba Ammal, (1913) I L R 38 Mad 260: 28 M L J 347. 441
Kalliyanasundaram Pillai v. Subba Moopanar, (1902) 14 M L J 139. 344

PAGE
Kameswaramma v. Venkatasubba Rao, (1915) I L R 38 Mad 1120: 27 M. L J 112. 179, 184, 187, 195
Kameshwar Pershad v. Rajkumari Rattan Koer, (1892) L R 19 I A 234: I L R 20 Cal 79 (P C). 510, 511, 512
Karsandas v. Chotalal, (1866) L R 2 Ch A 77 .. 542
Kartik Chandra Ogha v. Gora Chand Marto, (1913) I L R 40 Cal 518 .. 802, 828
Karupabdhi Ganesaratnam Aiyar v. Gopalaratnam Aiyar, L R 7 I A 173: I L R 2 Mad 270 (P C) .. 937
Karupanna Thevar v. Angammal, (1926) 51 M L J 67 .. 348
Katha Perumal Thevan v. Ramalinga Thevan, (1914) 17 M L J 138. 871
Kenath Puthen Vittil Tavazhi v Narayanan, (1904) I L R 28 Mad 182: 14 M L J 415 (F B) .. 210
Kerr v. Wilkie, (1860) 6 Jur N S 383: 119 R R 1019. 387, 390, 410
Kerwick v. Kerwick, (1920) L R 47 I A 275: 39 M L J 296 (P C). 655
Kesar Singh v. Secretary of State, I L R 49 Mad 652: 51 M L J 16 .. 931, 937
Keshoram Poddar v. Nundo Lal Mullick, (1927) 54 I A 152: 53 M L J 655 (P C) .. 466
Khatija v. Shekh Adam Husenally, (1915) I L R 39 Bom 545 .. 269
Khudiram Mukherjee v. Bonwari Lal Roy, (1889) I L R 61 Cal 584. 864
King v. Davenport, (1879) 4 Q B D 402 841, 842, 844
King v. Hoseason, (1811) 14 East 605: 104 E R 734 .. 646
King v. Mayor, Burgesses and Commonalty of Carmarthen, (1813) 105 E R 260 .. 400
Konda Reddi v. King-Emperor, (1917) I L R 41 Mad 246 .. 696
Kishen Mohan Mitter v. Khettermoni Dessi, 2 Hay 196. Marsh 313. 864
Kondeti Naicker v Gopala Aiyar, (1913) I L R 38 Mad 482: 25 M L J 425 .. 574
Koroth Amman Kutti v. Appu Nambiar, (1906) I L R 29 Mad 322. 209
Kotankandi Koma v. Sivasankaran, (1909) 20 M L J 134 .. 209
Kotayya v. Kotappa, (1925) 49 M L J 117. 318, 319, 320
Kothandarama Chettiar v. Annamalai Pillai, (1924) I L R 48 Mad 488: 48 M L J 406 .. 384
Krishnamachari v. Messrs. Shaw Wallace & Co, (1915) I L R 39 M 576: 29 M L J 178 .. 501, 502
Krishnamurthy Aiyar v Krishnamurthy Aiyar, (1927) L R 54 I A 248: I L R 50 Mad 508: 53 M L J 57 (P C). 966, 990, 991, 1005
Krishnan v. Damodaran, (1912) I L R 38 Mad 48: 24 M L J 240 (F B) .. 210
Krishna Naidu v. Muthukrishnappa Naidu, (1917) M W N 273 .. 495
Krishna Reddi v. Emperor, (1909) I L R 33 Mad 90: 20 M L J 102 .. 219
Krishnaswami v. Emperor, (1924) 48 M L J 132 .. 571
Krishnaswami v. Ramaswami, (1899) I L R 22 Mad 519: 9 M L J 127. 178, 179, 180, 187, 194
Krishnaswami Aiyar v Swaminatha Aiyar, (1924) I L R 48 Mad 331: 48 M L J 36 (F B) ... 560
Krishniah v. Guruviah, (1921) 41 M L J 503 .. 145
Krishniah v. Venkataramiah, (1903) 19 M L J 723 .. 146
Kristnayya v. Lakshmipathy, (1920) L R 47 I A 99: I L R 43 Mad 650: 39 M L J 70 (P C) .. 980, 981
Kunhacha Umma v. Kutti Mammi Hajee, (1892) I L R 16 Mad 201: 2 M L J 226 (F B) 209, 212, 213
Kunhamina v. Kunhambi, (1908) I L R 32 Mad 315 .. 209

PAGE

Kunjamani Dasi v. Nikunja Behari Das, (1915) 22 C L J 204 .. 766
Kuppanna Goundan v. Kumara Goundan, (1910) I L R 34 Mad 450: 20 M L J 961 .. 187
Kuttu Goundan, *In re*, (1924) 47 M L J 689 .. 26

L

Labh Singh v. The Crown, (1924) I L R 6 Lah 24 .. 353, 357
Lachminarain v. Turabunnissa, (1911) I L R 34 A 246 .. 508
Lachmi Narain Marwari v. Balmukund Marwari, (1924) L R 51 I A 321: I L R 4 Pat 61 47 M L J 441 (P C) .. 257, 258, 259, 260, 261
Lakshmana Chetty v Chinnathambi Chetty, (1900) I L R 24 Mad 326 .. 430
Lakshmibai, *In re*, (1888) I L R 12 Bom 638 .. 519, 520
Lakshminarasimha Somayagiyar v. Ramalingam Pillai, (1920) 39 M L J 319 .. 643
Lala Ram Jiwan Lal v. Dal Koer, (1897) I L R 24 Cal 406 .. 687
Lalit Mohun Singh Roy v. Chukkan Lal Roy, (1897) L R 24 I A 76: I L R 24 Cal 834 .. 687
Lalla Mal Hardeo Das Cotton Spinning Mills, *In the matter of*, (1923) I L R 46 A 1 .. 24
Lanoy v. The Duke of Athol, (1742) 2 Atkinson 444 .. 360
Laurentius Ekka v. Dhuki Koeri, (1925) I L R 4 Pat 766 .. 564
Law v. Law, (1905) 1 Ch 140 .. 540
Leonard v. Western Services, Ltd., (1922) 1 K B 570 .. 216.
Limbaji Ravji v. Rahi, (1925) I L R 49 Bom 576 .. 871
Llanover v. Homfray, (1881) L R 19 Ch D 224 .. 900, 943
London and South Western Railway Co. v Gomm, (1882) 20 Ch D 562 .. 156
Lorenz's Settlement, *In re*, (1861) 62 E R 433 .. 519, 520
Lovell and Christmas v. G. W. Beachamp, (1894) A C 607 .. 726

M

Maclaren v. Thompson, (1917) 2 Ch 261 (C A). 387, 389, 390, 409
Mackenzie, *In re*: Hertfordshire (Sheriff of), *Ex parte*, (1899) 2 Q B 566 .. 877
Madhab Chandra Saha v. Emperor, (1926) I L R 53 Cal 738.. 119
Madhavrao Waman Sundalgekar and others v. Ragunath Venkatesh Deshpande, (1923) L R 50 I A 255: I L R 47 Bom 798: 47 M L J 248 (P C) ... 890
Mahableshwar v. Durgabai, (1898) I L R 22 Bom 199 .. 970, 989
Maharajadiraj of Dharbanga v. The Commissioner of Income-tax, (1924) I L R 3 Pat 470 .. 772
Maharaja of Jeypore v. Rukmini Pattamahadevi, (1919) L R 46 I A 109: I L R 42 Mad 589: 36 M L J 543 (P C) .. 890
Maharajah of Jeypore v. Sobha Sundar Delai, (1925) 49 M L J 540. 799, 800, 812, 826
Maharaj Singh v. Balwant Singh, (1906) I L R 28 A 508 .. 371
Maharani Beni Pershad Koeri v. Dudh Nath Roy and others, (1899) L R 26 I A 216: I L R 27 Cal 156 (P C) .. 890
Mahomed Ally Adamji v. Abdul Hussein, (1923) I L R 48 Bom 331 .. 273
Mahomed Foyaz v. Khan Mahomed, (1872) 18 W R (Cr) 10.. 769

PAGE
Mahomed Ibrahim v. Gulam Ahmad, (1864) 1 Bom H C R 236. 832, 833
Mahomed Idris v. Crown, (1924) I L R 6 Lah 56. 446, 448, 449
Mahomed Shumsool v. Sheewukram, (1874) L R 2 I A 7 .. 209
Makhan Lal Ram Sarup, *In the matter of,* (1924) 24 A L J 40.. 24
Malgauda Paragauda v. Babaji Dattu, I L R 37 Bom 107 .. 939
Mallikarjuna v. Sri Devamma, (1897) L R 24 I A 73: I L R 20 Mad 162 (P C) .. 764
Mamat Ali v. Emperor, (1926) 44 C L J 233 .. 593
Manchubhai Navalchand v John H. Todd, (1894) I L R 20 B 633. 591
Mandru Gadaba, *Re,* (1914) I L R 38 Mad 479 .. 230
Manian v. Kuthira Vattath Raman, (1920) 41 M L J 15 .. 455
Manilal Motilal v. Gokal Das, (1920) I L R 45 Bom 245 .. 431, 433
Manks v. Whiteley, (1911) Ch 448 .. 360
Manujendra Dutt Chowdhury v. Jnan Ranjan Somaddar, (1925) 87 I C 818 .. 259
Marappa Goundan v. Rangaswami Goundan, (1899) I L R 23 M 89 .. 492, 494
Ma Thaung v Ma Than, (1923) L R 51 I A 1: I L R 51 C 374: 46 M L J 618 (P C) .. 136
Maugham, *In re*: Maugham, *Ex parte,* (1888) L R 11 Q B D 21.. 169
Ma Ywet v. Ma Me, (1909) L R 36 I A 192: I L R 36 C 978: 19 M L J 577 (P C) .. 99
McLaren v Thompson, (1917) 2 Ch 41 .. 387
Mersey Docks and Harbour Board v. Henderson Brothers, (1888) 13 A C 595 .. 338
Miller v. Ranganath Moulick, (1885) I L R 12 Cal 389 508, 511, 513
Miras Chowkidar, *In the matter of,* (1903) 17 C W N 713 .. 769
Mohammadi Bibi v. Kashi Upadhya, (1926) 96 I C 775 .. 384
Mohesh Lal v. Mohunt Bawan Das, (1883) I L R 9 Cal 961: 10 I A 62 (P C) .. 371
Moideensa Rowthen v. Md Kasim Rowthen, (1915) 28 I C 895.. 271
Mollwo, March & Co. v. The Court of Wards, (1884) L R 27 Ch D 460 .. 16
Moore & Co. and Landner & Co, *In re,* (1921) 2 K B 519 .. 5
Muddan Thakore v. Kantoo, (1873) L R 1 I A 321: 14 Beng L R 187 (P C) .. 185, 194
Mulchand Nemi Chand v. Basdeo Ram Sarup, (1926) I L R 48 All 404 .. 665, 669
Municipal Corporation of the City of Toronto v. Virgo, (1896) A C 88 .. 564
Municipal Council, Chicacole v. Seetharamayya Naidu, (1925) 21 L W 280 .. 571
Municipal Officer, Aden v. Ismail Haji, (1905) L R 33 I A 38: I L R 30 Bom 246: 16 M L J 73 (P C). 807, 815, 824
Munshi Raghunath Singh v. Hayari Sahu, (1917) 2 Pat L J 130 (S B) .. 367, 368
Munster v. Cammel Company, (1882) 21 Ch D 183 .. 387
Musgrave v. Pandelis, (1919) 2 K B 43 .. 665, 669
Mt. Lachmibati Kumari v. Nandkumar Singh, (1920) 5 Pat L J 400 .. 349
Muthiah Chetty v. Periannan Chetty, (1916) 4 L W 228 .. 614
Muthu Balu Chetty v. Chairman, Municipality, Madura, (1927) 53 M L J 633 (F B) .. 570
Muthukumara Chetty v. Anthoni Udayar, (1914) I L R 38 M 867: 29 M L J 617 .. 687

PAGE

Muthukumaraswami Pillai v. King-Emperor, (1912) I L R 35 Mad 397 · 22 M L J 490 (F B) .. 353, 354
Muthuswami v Masilamani, (1909) I L R 33 M 342: 20 M L J 49. 482, 488

N

Nadar v . Emperor, (1923) 73 I C 323 .. 500
Nagalingam Pillai v. Ramachandra Thevar, (1901) I L R 24 M 429: 11 M L J 210 .. 689
Nagarampalli Kamesam v. Nagarampalli Batchamma, (1914) M W N 620. 938, 974, 991
Nagindas Bhugwandas v. Bachoo Harkissondas, (1915) L R 43 I A 56: I L R 40 Bom 270: 30 M L J 193 (P C) .. 784
Nagindas Bhukandas v. Ghelabhai Ghulabdas, (1919) I L R 44 Bom 673 .. 39
Nagoor Kanni Nadura v Sithu Naick, (1926) 52 M L J 32 .. 119
Nainapillai Marakkayar v. Ramanathan Chettiar, (1923) L R 51 I A 83: I L R 47 Mad 337 · 46 M L J 546 (P C) .. 890
Nainappa Chetti v. Chidambaram Chetti, (1897) I L R 21 M 18. 328
Namoni v. Modhun Mohun, (1886) 13 I A 1: I L R 13 Cal 21 (P C) .. 186
Namperumal Chetti v. Narasimhachari, (1916) 31 M L J 698 .. 558, 561
Nandamuri Anandayya, *In re,* (1914) 25 I C 630 .. 233, 234
Nanjappa v Nanjappa Rao, (1912) 23 M L J 290 .. 432, 433
Nanni Kudumban v. Emperor, (1923) 45 M L J 406. 592, 594, 595
Narasimha v. Parthasarathy, (1913) L R 41 I A 51: I L R 37 M 199: 26 M L J 411 (P C) .. 759
Narasimhacharlu v. Venkata Singaramma, (1909) I L R 33 Mad 165: 19 M L J 719 .. 145, 146
Narasimha Chettiar v. Balakrishna Chetty, (1926) 52 M L J 512. 566
Narayan v. Bhagu, (1907) I L R 31 Bom 314 (F B) .. 117
Narayanan Chettiar v Muthu Chettiar, (1926) I L R 50 Mad 67: 51 M L J 219 .. 276
Narayanan Chetty v. Suppiah Chetty, (1920) I L R 43 Mad 639: 38 M L J 437 .. 855
Narayana Naickan v. Venkatasami Naickan, (1926) 51 M L J 845. 12
Narayan Singh v. Niranjan Chakravarthi, (1923) L R 51 I A 37.. 11
Nataraja Pillai v. Rangaswami Pillai, (1923) I L R 47 M 56: 44 M L J 328. 622, 623, 624
Narsingh Dayal Sahu v. Ram Narain Singh, (1903) I L R 30 Cal 883 .. 886
Natesa Pillai v. Kannammal, (1923) 46 M L J 181 .. 254, 259
Naubat Singh v Indar Singh, (1890) I L R 13 A 200 .. 508
Nena v. Parbhu, (1923) 75 I C 508 .. 145
New Zealand Shipping Co. v. Societe des Ateliers et Chantiers de France, (1919) A C 1 (H L) .. 390, 412
Nicholson v. Brown, (1897) W N 52 .. 544
Nihal Singh v Khushhal Singh, (1916) I L R 38 All 297 .. 263
Nilmoni Singh Deo v. Taraknath Mookerjee, (1882) I L R 9 Cal 295 (P C). 802, 806, 808, 814, 820, 821
Nistarini Dassi v. Nundoo Lal Bose, (1902) I L R 30 Cal 369 .. 272
North Eastern Railway Co. v. Lord Hastings, (1900) A C 260 .. 136
Nunna Chetti v. Chidaraboyina, (1902) I L R 26 M 214. 725, 729, 731

PAGE

O

Official Assignee, Bombay v. Registrar, Small Causes Court, Amritsar, (1910) I L R 37 Cal 418: 20 M L J 432 (P C) .. 175
Official Assignee of Madras v. Palaniappa Chetty, (1918) I L R 41 M 824: 35 M L J 473 .. 477
Official Assignee of Madras v Ramachandra Aiyar, (1922) I L R 46 M 54: 43 M L J 569 . 164, 167, 177, 181, 182, 189, 190, 195, 196, 726, 729
Official Assignee of Madras v. Sheikh Moideen Rowther, (1927) I L R 50 Mad 948: 53 M L J 890 .. 242
Official Receiver, South Arcot v. Perumal Pillai, (1923) 18 L W 884 .. 166

P

Padmavathi v. Srinivasa Kamathi, (1917) 7 L W 339 .. 106
Palani Ammal v. Muthuvenkatachala Moniagar, (1924) L R 52 I A 83: I L R 48 M 254: 48 M L J 83 (P C). 140, 146, 150
Palaniappa Chetti v. Valliammai Achi, (1926) I L R 50 M 1: 51 M L J 745 .. 498
Paramaswami Aiyangar v. Nachiar Ammal, (1918) 42 M 76. 35 M L J 632 .. 826, 827
Parameswar Singh v. Emperor, (1910) I L R 38 Cal 180 at p. 181. 272
Parasara Bhattar v. Ranga Bhattar, (1880) I L R 2 Mad 202 .. 973, 980, 1000
Parashuram v. Tata Industrial Bank Ltd., (1923) I L R 47 B 915. 700
Parthasarthy Naidu v. Koteswara Rao, (1923) I L R 47 M 369: 46 M L J 201 (F B) . 641
Pasmore v. Oswaldwistle Urban District Council, (1898) A C 387. 640
Patel Vandravan Jekisan v. Patel Manilal Chunilal, (1891) I L R 15 Bom 565 .. 989
Patinharkara Vallaban Chattan Raja v. Rama Varma, 28 M L J 669 .. 900
Patlogi v. Gamo, (1891) I L R 15 Bom 370 .. 350
Pattatharuvath Pathumma v. Mannamkuniyil Abdulla Haji, (1907) I L R 31 M 228: 18 M L J 16 .. 209
Periaswami Aiyangar v. Natchiar Ammal, (1918) I L R 42 M 76: 35 M L J 632 . 800, 803, 811
Pertab Narain Singh v. Subhao Kooer, (1877) L R 4 I A 228: I L R 3 Cal 626 (P C) .. 785
Perumal Pillai v. Raman Chettiar, (1917) I L R 40 Mad 968: 33 M L J 211 (F B) .. 361
Pethaperumal Chetty v. Muniandi Servai, (1908) I L R 35 C 551: 18 M L J 277 (P C) .. 858
The Petition of the Attorneys, *In the matter of,* (1875) I L R 1 Mad 24 .. 560, 561
Petition of Dhuronidhur Ghose, *In the matter of,* (1889) I L R 17 Cal 298 .. 865
Pingala Lakshmipathi v. Bommireddipalli Chalamayya, (1907) I L R 30 M 434: 17 M L J 101 (F B). 581, 582, 583
Pitt v. La Fountaine, (1880) L R 6 App Cas 482. 877, 878, 880, 882
Ponnappa v. Pappuvayyangar, (1882) I L R 4 M 1 .. 179, 186
Potita Pavana Panda v. Narasinga Panda, (1919) I L R 42 M 632: 36 M L J 538 .. 80
Prankishen v. Mothooramohan, (1865) 10 M I A 403 .. 146

PAGE

Prasad Row v. Secretary of State for India in Council, (1917) L R 44 I A 166: I L R 40 Mad 886: 33 M L J 144 (P C) .. 287
Printing Telegraph and Construction Company of the Agence of Hevas, Ltd. v. Drucker, (1894) 2 Q B 804 (C A) .. 942
Pritchard v. Mayor, etc., of Bengor, (1888) 13 A C 241 .. 642
Public Prosecutor v. Abdul Hameed, (1912) I L R 36 M 585 .. 592
Pulbrook v. Richmond Consolidated Mining Co., (1878) 9 Ch D 610. 387, 398
Purushotham Janardhan v. Mahadu Panda, (1912) I L R 37 Bom 114 .. 816

Q

Queen-Empress v. Chinna Thevan, (1890) I L R 14 Mad 36: 2 Weir 390 .. 595
Queen-Empress v. Fateh Singh, (1889) I L R 12 A 432 .. 504
Queen-Empress v. Guruvadh, (1890) I L R 13 Mad 343: 2 Weir 389 .. 595
Queen-Empress v. Irappa, (1889) I L R 12 Mad 459 .. 230
Queen-Empress v. Joynarain Patro, (1873) 20 W R (Cr) 66 .. 504
Queen-Empress v Lakshman Dagdu, (1886) I L R 10 Bom 512.. 230
Queen-Empress v. Monu, (1888) I L R 11 Mad 443 .. 717
Queen-Empress v. Saminatha, (1890) I L R 14 Mad 400: 1 M L J 163 .. 504
Queen-Empress v. Veerammal, (1882) I L R 16 Mad 230 .. 570
Queen-Empress v. Venkataswami, (1890) I L R 14 Bom 564 .. 230
Quesnel Forks Gold Mining Co. v. Ward, (1920) A C 222 (P C). 390, 413

R

R. v. Carmarthen, (1815) 1 Maule and Selwyn 697 .. 387
R. v. D'Oyly, (1840) 12 Ad. & El. 139: 113 E R 762 .. 387
Radhabai and Ramachandra Kunher v. Anantrav Bhagwant Deshpande, I L R 9 Bom 198 .. 980
Radha Mohun Dutta v Nripendra Nath Nandy, (1927) 47 C L J 118. 795, 797
Ragunath Prasad Singh v. Deputy Commissioner of Partabgarh, (1927) L R 54 I A 126 .. 651
Raghunath Rai Dilsuk Rai v. Bridhi Chand Sri Lal, (1924) I L R 3 Pat 839 .. 263, 264
Rahmat Karim v. Abdul Karim, (1907) I L R 34 C 672 .. 508
Rai Beni Prasad v. Edal Singh, (1918) 4 Pat L J 37 .. 368
Rajagopal Pillai v. Veeraperumal Pillai, (1927) 53 M L J 232 .. 689
Rajah Nilmoni Singh v. Bakranath Singh, (1882) L R 9 I A 104. 8
Rajah Ramessur Proshad Narain Singh v. Rai Sham Krissen, (1901) 8 C W N 257 .. 367
Rajaram Narain Singh v. Odindra Nath Mookerjee, (1911) 17 C W N 369 .. 508
Raja Venkatappa Nayanim Bahadur v. Ranga Rao, (1915) I L R 39 M 772: 29 M L J 18 .. 761
Rajah of Vizianagaram v. Raja Setrucharala Somasekraz, (1902) I L R 26 M 686: 13 M L J 83 (F B) .. 441
Rajmal Girdharlal v. Maruthi Shivram, (1920) I L R 45 Bom 329. 265
Rakha v. The Crown, (1925) I L R 6 Lah 171 .. 354, 357
Ramachandra v. Ganesh, (1899) I L R 23 Bom 382 .. 117
Ramachandra v. Kodayya Chetty, (1901) I L R 24 M 555 .. 180
Ramachandra v. Mulji Nanabhai, I L R 22 Bom 558 (F B) .. 913, 970

PAGE

Rangaraja Bhattar v. Rangaraja Bhattar, I L R 2 Mad 202 .. 913
Ramchandra v. Mulgi Nanabhai, (1898) I L R 22 Bom 397 .. 1002
Ramachandra Bhagawan v. Mulgi Nanabhai, (1898) I L R 22 Bom 558 (F B) .. 984
Ramachandra Naidu v. Batcha Sahib, (1917) 22 M L T 225 .. 18
Ramachandra Rao v. Ramachandra Rao, (1922) L R 49 I A 129: 43 M L J 78 (P C) .. 620
Ramachandran Servai v. President, Union Board, Karaikudi, (1925) I L R 49 Mad 888: 49 M L J 356. 28, 30, 571
Ramadina Das Gosayiji Garu v. Boishamo Mundalo, (1921) 14 L W 251 .. 380
Raman Menon v. Raman Menon, (1900) L R 27 I A 231: I L R 24 Mad 73: 10 M L J 245 (P C) .. 210
Rama Rao v. Narasimha Nayanim Varu, (1915) 28 M L J 363 . 997
Ramaswami v. Kasinatha, A I R 1928 M 226 .. 872
Ramaswami v. Venkatesam, (1892) I L R 16 M 440: 30 M L J 107. 144, 146
Ramaswami Chettiar v. Ramaswami Aiyangar, (1921) I L R 45 Mad 434: 42 M L J 185 .. 166
Ramaswami Goundan v. Kali Goundan, (1918) I L R 42 M 310: 36 M L J 571. 800, 803, 804, 810, 811, 812, 826, 827
Ramaswami Naicker v. Subbarayalu Naicker, (1916) 13 L W 158. 799, 813
Ramaswami Pillai v. Govindaswami Naicker, (1918) I L R 42 M 319: 36 M L J 104 .. 159, 662
Ramayya v. Zamindar of Mandasa, 1926 M W N 351 .. 812
Rambilas, *In re,* (1914) I L R 38 M 639: 29 M L T 175 .. 501
Ram Dayal v. Ramadhin, (1890) I L R 12 A 198 .. 810, 816
Ram Din v. Kalka Prasad, (1884) L R 12 I A 12: I L R 7 A 502 (P C). 508, 510, 513
Ramesh Chandra Das v Sarada Kirpa Lala, (1921) I L R 49 C 355. 336
Ram Pershad Singh v. Lakhpati Koer, (1902) L R 30 I A 1: I L R 30 C 231 (P C) .. 136
Ramprasad Surajmull v. Mohan Lal Lachminarain, (1920) I L R 47 Cal 752 .. 436
Ramrup Das v. Mohunt Shiyaram Das, (1910) 14 C W N 932 .. 347, 348
Ram Tuhul Singh v. Biseswar Lall Sahoo, (1875) L R 2 I A 131: 23 W R 305 (P C) .. 871
Ranchhod v. Secretary of State, (1896) I L R 22 Bom 173 .. 37
Rangasami Goundan v. Nachiappa Goundan, (1918) L R 46 I A 72: I L R 42 M 523: 36 M L J 493 (P C). 860, 861, 989
Rangayya Chetty v. Thanikachalla Mudaly, (1895) I L R 19 Mad 74. 723, 725, 728, 729, 732
Rani Bhagwan Kuar v. Jogendra Chandra Bose, (1903) 30 I A 249: 13 M L J 381 (P C) .. 484
Ranjit Narain Singh v. Rambahadur Singh, (1925) I L R 5 Pat 262. 446, 447, 449
Rathna Naidu v. Aiyamachariar, (1908) 18 M L J 599. 178, 184, 195
Rathnasami v Subramania, (1887) I L R 11 Mad 56 .. 508
Ravi Veeraraghavalu v. Venkatanarasimha Naidu Bahadur, (1914) L R 41 I A 258: I L R 37 M 443: 27 M L J 365 (P C) .. 804, 808, 809, 822
Reg. v. Bird: *Ex parte* Needes, (1898) 2 Q B 340 .. 564
Remon v. City of London Real Property Co, (1921) 1 K B 49.. 469
Rex v. Essex Justices: Perkins, *Ex parte,* (1927) 2 K B 475 .. 682
Risal Singh v. Balwant Singh, L R 45 I A 168: I L R 40 A 593: 36 M L J 597 (P C) .. 900, 943

PAGE

Rottala Runganathan Chetty v. Pulicat Ramasami Chetty, (1903) I L R 27 M 162 (F B). 491, 492, 493, 494
Rylands v. Fletcher, (1868) L R 3 H L 330 .. 664, 665

S

S S. B., *In re*, (1906) 1 Ch 712 .. 731
Saadatmand Khan v. Phul Kuar, (1898) I L R 20 All 412: 25 I A 146 (P C) .. 365, 367
Sadasuk Jankidas v. Sir Kishan Pershad, (1918) I L R 46 Cal 663 · 36 M L J 429 (P C) .. 575
Sahdeo Narain v. Kusum Kumari, (1922) · 50 I A 58: 44 M L J 476 (P C) .. 483
Sahu Ramchandra v. Bhup Singh, (1917) 44 I A 126: I L R 39 A 437 33 M L J 14 (P C) .. 187
Sakharam Bala v. Thama, (1927) I L R 51 Bom 1019 .. 860
Sales v. Lake, (1927) 1 K B 702 .. 216
Salt, *In re*, (1896) 1 Ch 117 .. 731
Samuel Marie Brereton, *In re*, (1883) I L R 7 B 381 .. 519, 520
Sankaralinga Chetti v Annamalai Chetti, (1908) 19 M L J 304.. 332, 334 335, 337
Sankaran Nambudripad v Sankaran Nair, (1921) I L R 44 M 960. 452, 453, 454
Sankararama Aiyar v. Padmanabha Aiyar, (1912) I L R 38 M 25: 23 M L J 373 .. 117
Sanyasi Charan Mondal v. Ashutosh Ghose, (1914) I L R 42 C 225. 722, 723, 726
Sanyasi Charan Mondal v Krishnadhan Banerjee, (1922) L R 49 I A 108: I L R 49 Cal 560: 43 M L J 41 (P C) .. 726
Sarada Prasad Tej v. Triguna Charan Ray, (1922) I L R 1 Pat 300. 795, 797
Sardar Singh v. Emperor, (1917) 44 I C 451 .. 769
Sarvothama Rao v. Chairman, Municipal Council, Saidapet, (1923) I L R 47 Mad 585. 45 M L J 23 .. 643
Sashi Bhushan Misra v Jyoti Prasad Singh Deo, (1916) L R 44 I A 46. 32 M L J 245 (P C) .. 459
Sat Narain v. Behari Lal, (1924) L R 52 I A 22: I L R 6 Lah 1: 47 M L J 857 (P C). 165, 183, 193, 197, 722, 723, 724, 726, 730, 732
Satyaniranjan Chakravarti v. Ram Lal Kaviraj, (1924) L R 52 I A 109: 48 M L J 328 .. 459
Scadding v. Lorant, (1851) 3 H L C 418. 387, 390, 409
Schafer v. Blyth, (1920) 3 K B 140 · 89 L J K B 671 .. 841, 844
Scott v. The London and St. Catherine Docks Co., (1865) 3 H & C 596 · 159 E R 665. 665, 669, 670
The Script Phonography Co., Ltd. v. Gregg, (1890) L J R 59 Ch D 406 .. 841, 842
Secretary of State for India v. Rajkumar Mukherjee, (1922) 27 C W N 472 .. 39
Seetharama Chettiar v. The Official Receiver, Tanjore, (1926) I L R 49 Mad 849 · 51 M L J 269 (F B). 165, 722, 723, 724, 728, 729, 730
Seetharam Naidu v. Balakrishna Naidu, (1913) 26 M L J 604.. 495
Seetharamaraju v Subbaraju, (1911) I L R 45 M 361: 42 M L J 262 .. 740
Seshadri Aiyangar v. Ranga Bhattar, (1911) I L R 35 M 631: 21 M L J 580 .. 645
Seshagiri Rao v. Hanumantha Rao, (1915) I L R 39 Mad 1031. 375, 376

PAGE
Sesha Phabu, *In re*, (1921) 42 M L J 149 .. 571
Shakur Mahomed v. Chunder Mohun Sha, (1874) 21 W R (Cr) 38. 769
Sham Lal Pal v. Modhu Sudhan Sircar, (1895) I L R 22 Cal 558. 550
Shannon Realties, Ltd v. St. Michel, (1924) A C 185 .. 643
Sharp, *Ex parte*, (1886) 34 W R 550 .. 238
Shavakshaw v. Tyab Haji Ayub, (1916) I L R 40 B 386 .. 431, 433
Sheobaran Singh v. Mt. Kulsum-un-nissa, (1924) 54 I A 204: I L R 49 A 367: 52 M L J 658 (P C) .. 192, 197
Sheo Nandan v. King-Emperor, (1918) 3 Pat L J 581 (F B) .. 822
Sheo Pershad Singh v. Mt. Soorajbansee Kooer, (1875) 24 W R 281 .. 185
Shivrao Narayan v. Pandlik Bhaire, (1902) I L R 26 B 437 .. 440
Shiyali Subraya Chettiar v. Calve Subraya Chettiar, 37 I C 404: 5 L W 740 .. 909
Sidraj Bhojraj v. Alli Haji, (1922) I L R 47 B 244 .. 159, 662
Simpson v Clayton, (1838) 8 L J (C P) 59 .. 650
Sinclair v. Brougham, (1914) A C 398 .. 777
Sitaramaiya v Pichaiya, (1911) 21 M L J 1005 .. 264
Sivarama Mudaliar v Muthannan Aiyangar, (1927) I L R 50 M 913: 52 M L J 561 .. 205
Slater v. Mayor, etc., of Burnley, (1888) 59 L T 636 .. 775
Smith, *In re*, (1923) 45 M L J 731 .. 572
Smith v. London and South Western Railway Co., (1870) L R 5 C P 98 and 6 C P 14 .. 665, 669
Solomon v. Bitton, (1881) L R 8 Q B D 176 .. 596
Somabhai Vallavbhai v. Aditbhai Parshottam, (1924) 48 Bom 401. 448
Spencer v. Kennedy, (1926) 1 Ch 125 .. 387
Sremutty Sourjemony Dossee v. Denobundo Mullick, (1857) 6 M I A 526 .. 209
Srinivasa Aiyangar v Official Assignee of Madras, (1913) 25 M L J 299 .. 672
Srinivasa Aiyar v. Balakrishna Devai, (1911) 22 M L J 187 .. 692
Srinivasamoorthy v. Venkatavarada Aiyangar, (1906) I L R 29 Mad 239: 16 M L J 238 .. 272, 273
Sri Raghunadha v. Sri Brojo Kishoro, (1876) L R 3 I A 154: I L R 1 Mad 69 (P C) .. 1003
Sri Rajara Rao Venkata Surya Mahipathy Ramakrishna Rao Bahadur v. Court of Wards, (1889) L R 26 I A 83: I L R 22 Mad 383: 9 M L J (Supp) 1 .. 994
Sri Raman Lalji Maharaj v Sri Gopal Lalji Maharaj, (1897) I L R 19 A 428 .. 765
Sri Virada Pratapa Ragunadha Deo v. Sri Brojo Kishoro Deo, I L R 1 Mad 69. 911, 979, 980, 981
Sri Vythilinga Pandarasannadhi v. Sir T. Sadasiva Aiyar, (1928) 55 M L J 605 .. 680, 683
Sri Yerruganti Chinna Venkatanarayanan v. Kotagiri Venkatanarasimha, (1913) M W N 1005 .. 574
Steel v. Williams, (1853) 8 Ex 625: 155 E R 1502 .. 776
Stone v Cartwright, (1795) 101 E R 622 .. 646
Stoughton v. Reynolds, (1736) 95 E R 176: 2 Str 1045 .. 387, 401
Subba Rao v. Appadurai Aiyar, (1924) 48 M L J 142 .. 80
Subbarayudu v. Ramadasu, (1921) I L R 45 Mad 872: 42 M L J 301 254, 255, 256, 258, 259, 260, 261, 262
Subramania Aiyar v. Krishna Aiyar, A I R 1927 Mad 701 .. 729
Subramania Aiyar v. Sabapathi Aiyar, (1927) I L R 51 M 361: 54 M L J 726 (F B). 177, 179, 196

PAGE

Subramania Chettiar v. Alagappa Chettiar, (1906) I L R 30 M 268 162
Subramanyam v. Venkamma, I L R 26 Mad 627: 13 M L J 239. 938
Sudalai Muthu Pillai v. Peria Sundaram Pillai, (1924) 48 M L J 514 .. 348
Sudalai Muthu Pillai v Sudalai Muthu Pillai, (1926) 51 M L J 67. 348
Sudalai Muthu Pillai v. Sudalai Muthu Pillai, (1922) 17 L W 623. 347, 348
Suffel v. Bank of England, (1882) 9 Q B D 555 .. 630, 632
Sundar v. Habib Chik, (1920) I L R 42 All 626 .. 331, 335
Sundaram v. The Queen, (1883) I L R 6 M 203 (F B) .. 623
Sundaram Aiyangar v. Ramaswami Aiyangar, (1918) I L R 41 M 955: 35 M L J 177 .. 34
Sundaram Chetty v. The Queen, (1883) I L R 6 M 203 (F B). 443
Sundarammal v. Sundara Reddi, (1927) 38 M L T 148 .. 329
Sundararama Reddi v. Pattabhirama Reddi, (1917) 6 L W 272.. 376
Suraj Bansi v. Sheo Pershad, (1881) I L R 5 C 148: 6 I A 88 (P C) .. 186
Surajmani v. Rabi Nath Ojah, (1907) L R 35 I A 17: 18 M L J 7 (P C) .. 620
Suraj Narain's Case, (1917) L R 44 I A 201: I L R 40 A 159: 33 M L J 180 .. 744
Suramma v Suriyanarayana Jagapathiraju, (1918) I L R 42 Mad 114: 35 M L J 443 .. 318, 320
Suresh Chunder Goyee and others, *In re*, (1813) 23 C W N 431. 878, 880, 882
Swaminadha Aiyar v Vaidyanadha Sastri, (1905) I L R 28 Mad 466: 15 M L J 116 (F B) .. 550
Swarnamoyi Debi v. Hari Das Roy, (1902) 6 C W N 903 .. 439

T

Tagore v. Tagore, (1872) L R I A Supp Vol. 47 .. 46
Talewar Singh v. Bhagwan Das, (1907) 12 C W N 312 . 37
Taluk Board, Bandar v. Zamindar of Chellapalli, (1920) I L R 44 Mad 156: 40 M L J 91 .. 571
Tanguturi Jagannatham v Seshagiri Rao, (1916) 20 M L T 479. 376
Tara Chand v. Pudun Lochun, (1866) 5 W R 249 .. 147
Tenant, *Ex parte* Howard, *In re*, (1877) L R 6 Ch D 303 .. 16
Thandavaraya Pillai v Shunmugam Pillai, (1908) I L R 32 Mad 167: 19 M L J 59 .. 766
Thayammal v. Kuppanna Goundan, (1914) I L R 38 Mad 1125: 27 M L J 285 .. 871, 872
Tilakchand v Soudamini Dasi, (1878) I L R 4 Cal 566 .. 439
Tricomdas Cooverji v Gopinath Jiu Thakur, (1916) I L R 44 Cal 759: 32 M L J 357 (P C). 510, 511, 513
Trustees of the Ottawa Roman Catholic Separate Schools v The Quebec Bank, (1920) A C 230 .. 608
Tularam v. Tukaram, (1920) 64 I C 307: 17 N L R 81 .. 255

U

Uma Charan Mondal v Midnapore Zamindari Co., Ltd, (1914) 18 C W N 782. 802, 808, 816, 827
Ummanga v. Appadorai Pattar, (1910) I L R 34 Mad 387: 20 M L J 218 .. 209
Uma Sundari Devi v. Dwarkanath Roy, (1868) 2 Beng L R (A C) 284 .. 858

PAGE

Unichaman v. Ahmad Kutti Kayi, (1897) I L R 21 Mad 242 8 M L J 81 .. 508
Union Board, Paramakudi v. Chellaswami Thevar, (1926) M W N 676 .. 28, 30

V

Vadivelam v. Natesam, (1912) I L R 37 M 435: 23 M L J 256. 492, 493, 495
Vaitheswara Aiyar v. Srinivasaraghava Aiyangar, (1919) I L R 42 Mad 348: 36 M L J 296 (F B) .. 858
Valluri Narasimha Rao v. The Ryots of Peddamamidipalli, (1925) I L R 49 M 499: 1926 M W N 131 .. 799, 800, 801, 805, 807, 808, 810, 811, 812, 817, 826
Valluru Appalasuri v. Sasapu Kannamma Nayuralu, (1925) 49 M L J 479 .. 344
Vanamalai Jeer Swamigal v. Venkatramachariar, (1922) 16 L W 931 .. 645
Varada Pillai's Case, (1919) L R 46 I A 285: I L R 43 M 244: 38 M L J 313 (P C) .. 743
Varadarajulu Naidu v. King-Emperor, (1919) I L R 42 M 885: 37 M L J 81 (S B) .. 678
Vasudeo Atmaram Joshi v. Ekanath Balkrishna Thite, (1910) I L R 35 B 79 .. 740
Vedavalli Narasiah v. Mangamma, (1903) I L R 27 Mad 538.. 386
Veerabasavaraju v. Balasurya Prasada Rao, L R 45 I A 265: I L R 41 M 998: 36 M L J 40 (P C) .. 912, 913, 915, 932, 936, 971, 973, 980, 990, 1003
Veerchand v. B. B. and C. I. Railway, (1904) I L R 29 B 259 .. 39
Velayuda Mudali v. King-Emperor, (1919) I L R 43 M 438: 39 M L J 85 .. 205
Vellanki Venkatakrishna Rao v. Venkata Ramalakshmi, I L R 1 M 174. 912, 990, 993, 994
Vellayyan Chetty v. Muthayya Chetty, (1920) 13 L W 59 .. 160, 161
Venkammal v. Namasivaya Chettiyar, (1895) 6 M L J 35 .. 977
Venkammal v. Subramaniam, L R 34 I A 22 I L R 30 M 50: 17 M L J 114 (P C) .. 912, 938
Venkanna v. Srinivasa Deekshatulu, (1918) I L R 41 M 136: 33 M L J 519. 179, 187, 195
Venkata v. Rama, (1884) I L R 8 M 249 (F B) .. 581
Venkatachala v. Rangiah, (1911) I L R 36 M 353: 21 M L J 990. 433
Venkatachalam v. Subbayya, (1927) 54 M L J 448 .. 566
Venkata Jagannadha v. Veerabadrayya, (1921) I L R 44 M 643: 48 I A 244: 41 M L J 1 (P C) .. 581
Venkatakrishnamma v. Annapurnamma, (1900) I L R 23 M 486. 973, 980
Venkata Lakshmamma v. Seetayya, (1920) I L R 43 M 786: 39 M L J 30. 318, 319, 320
Venkatapathi v. Punnamma, 1915 M W N 236. 914, 938, 973, 991
Venkatappayya v. Venkataranga Rao, (1919) I L R 43 M 288: 38 M L J 149 .. 105
Venkatrama Aiyar v. Official Receiver, Tinnevelly, (1927) I L R 51 M 344: 54 M L J 585 .. 241
Venkatarama Raju v. Papamma, I L R 39 M 77: 27 M L J 638. 914, 939, 974
Venkatarayadu v Venkataramayya, (1891) I L R 15 M 284 .. 581
Venkata Reddi v. Sathyanarayanamurthi, (1917) 40 M L J 473. 179, 187, 195
Venkatasubba Rao v. Adinarayana Rao, (1925) 50 M L J 46 .. 582

PAGE

Venkatasubbiah v King-Emperor, (1924) I L R 48 M 640: 48 M L J 195. 353, 354, 356
Venku Reddi v. Venku Reddi, (1926) I L R 50 M 535: 52 M L J 387 (F B) .. 190, 193
Vemareddi Ramaraghava Reddi v. Rajah of Venkatagiri, (1926) 52 M L J 123. 331, 334, 335
Vigneshwara v Bapayya, (1893) I L R 16 M 436: 3 M L J 216 .. 32
Viswasundara Rao v. Somasundara Rao, (1920) I L R 43 M 876.. 991
Vithal Nilkant Pinjale v. Vishvasrao, (1884) I L R 8 Bom 497.. 328
Vythilinga Mudaliar v. Srirangath Anni, L R 52 I A 322: I L R 48 M 883: 49 M L J 769 (P C) .. 900, 943

W

Walker, *Re*, (1886) 3 Morr 69 .. 239
Walker v. James, (1885) 53 L-T (N S) 597 .. 841
Watcham v Attorney-General, (1919) A C 533 .. 136
Waugh v. Carver, (1793) 2 Hy Bl 235 .. 16
Whistler v. Hancock, (1878) 3 Q B D 83. 841, 842, 843
W. H. Wilkinson, *In re*: The Official Receiver, *Ex parte*, (1884) 1 Morr Bank Cas 65 .. 877
William Whitely, Ltd. v. The King, (1909) 101 L T 741 .. 774
Wiskemann, *Re*, (1923) 92 L J Ch 349 .. 659

Z

Zamindar of Kallikote v. Mongolopur, (1926) 51 M L J 500 (F B). 799, 800, 812.

THE

Madras Law Journal Reports.

VOL.] JULY, 1928. [LV.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Lahore.]

PRESENT:—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Firm Chhunna Mal-Ram Nath .. *Appellants** (*Plffs.*)

v.

Firm Mool Chand-Ram Bhagat .. *Respondents* (*Defts.*)

P. C.

Firm Chhunna Mal-Ram Nath *v.* Firm Mool Chand-Ram Bhagat.

Contract Act, S. 63—Agreement to dispense as defined by S 2 (e) of Contract Act—Necessity—Breach of contract to deliver goods—Damages for—Claim to—Maintainability—Buyer wholly dispensing with delivery—Effect—Contract—Construction—Goods packed in wooden boxes lined with tin—Contract for—Packing in those cases if part of description of goods.

To a claim to recover damages for the breach of a promise to deliver the goods contracted for, it is, under section 63 of the Contract Act, a complete answer that the party complaining of the breach has wholly dispensed with the performance of the promise to deliver the goods. That section does not refer to any agreement (as defined by Section 2 (*e*) of the Contract Act) to dispense and ought not to be enlarged by any implication of English doctrines.

The opinion of Jenkins, C. J, to the contrary in *Abaji Sitaram Modak* v. *Trimbak Municipality,* (1903) I.L.R. 28 Bom. 66 at 72 disapproved.

Quaere: Whether, in the case of a contract for the delivery of goods (shirting) packed in wooden boxes lined with tin, the packing in those cases is part of the description of the goods contracted for, and whether the buyer can decline to accept goods of the contract quality merely on the ground that they were packed in bales instead of in wooden boxes lined with tin.

Appeal (No. 80 of 1927) from a judgment and decree of the High Court, Lahore (Harrison and Campbell, JJ.), dated

*P. C. Appeal No. 80 of 1927. 13th February, 1928.

P. C.
Firm Chhunna Mal-Ram Nath v. Firm Mool Chand-Ram Bhagat.

the 5th January, 1925, reversing a judgment and decree, dated the 14th January, 1924, of the Senior Subordinate Judge of Delhi.

The material facts of the case are set out in their Lordships' judgment.

De Gruyther, K. C. and *Wallach* for appellants.

Lowndes, K. C. and *Dube* for respondents.

13th Feb. 1928. Their Lordships' judgment was delivered by

Lord Atkinson.

LORD ATKINSON :—This is an appeal from decrees of the High Court of Judicature at Lahore, dated the 5th January, 1925, which reversed the decree of the Senior Subordinate Judge of Delhi, dated the 14th January, 1924, and dismissed the suit of the plaintiff with costs.

The suit out of which this appeal has arisen was one claiming damages for the non-delivery by the respondents of certain goods which the latter had agreed to sell and the appellants had agreed to purchase.

The principal question for decision in the appeal is whether under the circumstances proved in the case the plaintiffs are entitled to recover damages from the respondents for the alleged breach of their contract for the sale and delivery of the aforesaid goods.

In the order of the Court of the Subordinate Judge of Delhi, dated the 9th of August, 1921, it is stated that the respondents (the defendants) had presented for the second time an application to be at liberty to add a plea that the plaintiffs were not ready or willing to perform their part of the contract entered into between the parties, and *apropos* of this application the Court said:

"The real question in dispute is whether, in face of the correspondence, could the plaintiff claim damages and could he consider the contract as subsisting. These points are covered by the issues already framed by me If I find that the contract was cancelled and the plaintiff could not claim damages, the point as to readiness and willingness would not arise.

"If it is held by me that the contract subsisted, the question, as to readiness and willingness, would not crop up We have got letters sent by the defendant that he considered the contract as cancelled, and if I hold that he was not justified in considering the contract as cancelled, he had no *locus standi* to raise the plea as to the want of readiness and willingness on the part of the plaintiff."

The material parts of the aforesaid contract, which was dated the 29th November, 1916, and is very lengthy, ran as follows:—

"We had purchased one hundred and fifty (150) cases of white shirting marked D.-1 May to November, *i e*, seven shipments, of the office of R. J. Wood, at 20*s*. 2*d* We have sold the same to you at a net profit of Re. 0-4-0 per piece The patterns and the invoices of the goods will be given to you on receipt. You shall have to take delivery of the goods on payment of their price to the Bank. You shall have to remove the goods on compliance with the condition of the office of R. J. Wood. You shall have to pay interest and go-down rent according to the terms of the office of R. J. Wood Besides, you shall have to bear all the expenses incurred The goods shall be fresh.

"Contract made on Mangsir Sudi 5, Sambat 1973, through Moti Ram-Ram Kishan, Brokers

"(Sd.) MUL CHAND-RAM BHAGAT

"Contract in respect of 140 (one hundred and forty) cases confirmed."

It is common ground that a case marked "D.-1" means a tin-lined case containing 50 pieces of Messrs. R. J. Wood & Co.'s shirting, manufactured in England, and the goods the subject of the said contract were sold by Messrs. R. J. Wood & Co. to the respondents, and were to be as so packed for export.

The plaint is verified by the appellants. In its sixteenth paragraph it is alleged, and apparently not disputed by the respondents, that the shipment of the portion of the goods which should have arrived in India in the months of May and June, 1917, did not arrive till the month of March, 1918. The shipments which should have been made in July and August, 1917, did not arrive till June, 1918, and those of September, October and November, 1917, did not arrive till July, 1918.

On the 24th April, 1917 (*i.e.*, after the date of the said contract, but before the first shipment thereunder), an Order in Council was issued in London prohibiting the export of cotton goods in tin and wooden cases to India, and this was followed by a similar prohibition by the Government of India.

On the 28th April, 1917, the importers, Messrs. R. J. Wood & Co., wrote to the respondents as follows:—

"As the British Government prohibited the use of wood and tin cases, kindly note that all your goods on order will come out packed in bales instead of cases until such prohibition is withdrawn; if we do not hear from you within three days we shall understand you agree to this. If not, kindly instruct us how to send the goods out."

On the same day the respondents wrote to the appellants a letter to the following effect:—

P. C.

Firm Chhunna Mal-Ram Nath v. Firm Mool Chand-Ram Bhagat.

Lord Atkinson.

'DEAR SIRS,

"As the British Government have prohibited the use of wood and tin cases, kindly note that all your goods on order will come out packed in bales in place of cases unless such prohibition is withdrawn. If we do not hear from you within three days we shall understand you agree to this. If not, kindly instruct us how to send the goods out."

On the 1st of May, 1917, the respondents wrote to the appellants a letter in the following terms:—

"We are in receipt of your favour of date, and in reply have to say that, having sold Messrs. R. J Wood's goods to different parties, we cannot confirm the letter by sending it to you. If you are so very anxious to see the letter, you are quite welcome to come and see it at our shop. We have already sent you a copy of this letter, and if you will not come to our shop to satisfy yourself, please note we shall not be responsible. Please further note that, if we will not hear from you definitely in the matter within the allotted time, you will be responsible for all consequences."

In reply to this letter the appellants on the same day wrote to the respondents a letter running thus :

"DEAR SIRS,

"With reference to your letter, we beg to inform you that we do not agree to take the goods sold by you to us in bales instead of cases. Hence we cancel the goods, which please note."

Cancel the goods is not an accurate expression, and in this connection must mean cancel the contract entitling us to receive the goods.

To this letter the respondents on the 2nd of May replied in the following terms:—

"DEAR SIRS,

"We are in receipt of your letter dated 1st May, 1917, and in reply have to say that we sold you goods as per Messrs. R. J. Wood's terms, and as that office is going to ship goods in bales instead of cases, you are bound to abide with these terms and accept goods in bales. Please note that you are not bound to cancel the goods, and you will have to accept goods in bales as required by Messrs. R. J. Wood."

On the 4th of May, 1917, the appellants again wrote to the respondents thus :

"DEAR SIRS,

"In reply to your letter of the 1st of May, we beg to tell you that we . . . . . have cancelled the goods, and we again inform you. Please note."

On the 4th of May the appellants replied in the following terms to the respondents' letter of the 2nd of May which they must have received on the 3rd of that month. Their letter runs thus :

"In reply to your letter of the 3rd of May, we cannot accept the goods in bales instead of cases and tins. Please consider them as cancelled. Please note, once for all, as our dealers do not agree, we cannot accept."

P. C.

Firm Chhunna Mal-Ram Nath v. Firm Mool Chand-Ram Bhagat.

Lord Atkinson.

On the 8th of May the appellants again wrote to the respondents a letter in the following terms:—

"DEAR SIRS,

"*Re* our previous correspondence, we beg to tell you that we have cancelled all goods ordered through you, and we will not take at any stake, and also note we have reason and authority to cancel, and hence we will not at all be responsible for the delivery, which please note."

The appellants could not have been more emphatic in repudiating any obligation to accept bales and in refusing to be bound by or to perform it. If delivery of the shirting, packed in bales, was in conformity with the contract, the appellants clearly declared that they would not accept them, and this was acquiesced in by the respondents.

No evidence was given establishing that the goods purchased by the appellants could not have been safely shipped and carried to their destination, though packed in bales instead of in wooden boxes lined with tin. The lower Court was of opinion that packing in these cases was not part of the description of the goods sold. The High Court, on the contrary, expressed the opinion, grounded on the authority of the cases of *Bowes* v. *Shand*[1] and the case of *In re Moore & Co.* and *Landauer & Co.*[2] that the packing of the goods in such cases was part of the description of them. Having regard to the conclusion at which their Lordships have arrived on other portions of the case, it is unnecessary to deal with this point at length or to express any definite opinion upon it.

Section 39 of the Indian Contract Act runs thus :

"When a party to an agreement enforceable by law has refused to perform or disabled himself from performing an accepted proposal in its entirety, the person accepting the proposal may put an end to the agreement enforceable by law unless he has signified by words or conduct his acquiescence in its continuance."

Section 63 runs thus :

"Every person who accepts a proposal may dispense with or remit wholly or in part the performance of the proposal made to him which he has accepted, or he may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit."*

The contentions raised on these sections were as follows. The respondents, relying on sections 39 and 63, said that the appellants had put an end to the agreement and had expressly dispensed them from delivery at all. The appellants contended

1. (1877) 2 App. Cas 455. 2. (1921) 2 K. B. 519.

*It will be observed that their Lordships, in setting out these two sections (Ss. 39 and 63), have amplified them by recourse to the interpretation clause (*vide* section 2 of the Contract Act).—K. J. R.

P. C.
Firm Chhunna Mal-Ram Nath v. Firm Mool Chand-Ram Bhagat.
Lord Atkinson.

that section 63 applied only where there was an agreement to dispense or a contract, supported by consideration, to do so, and that in any case it could only operate, when the party dispensing had performed his part of the contract and only something remained to be performed on the other side, unless dispensed with [*Abaji Sitaram Modak* v. *Trimbak Municipality*[1]]. They further said that, if they had been wrong in refusing in advance to accept bales, this repudiation had not been accepted by the respondents, and therefore the contract remained alive and ought to have been performed. It is evident that the alleged dispensation under section 63 is by itself a complete answer, unless the absence of contract or consideration is fatal, for the appellants again and again dispensed with the performance by the respondents of their promise to deliver the goods contracted for, and they cannot recover damages for the breach of a promise touching the performance of a thing they wholly dispense with.

In *Abaji Sitaram Modak* v. *Trimbak Municipality*[1] Chief Justice Jenkins deals with section 63, and holds that the promisee mentioned in section 63, can only do the acts he is by that section empowered to do, if there be an agreement [as defined by S. 2 (*e*)] amongst the parties to that effect. At p. 72 of the report of this case the learned Judge is reported to have expressed himself thus :

"Therefore we hold that, assuming that there was a legal resolution, and that it was communicated as alleged, still, inasmuch as a dispensation or remission under section 63 requries an agreement or contract, the resolution was of no legal effect since the provisions of section 30 of the Bombay Act II of 1884 have not been observed."

With this their Lordships are unable to agree. The language of the section does not refer to any such agreement and ought not to be enlarged by any implication of English doctrines. On this they agree with the learned Judges of the High Court.

They are, therefore, of opinion that the appeal fails and should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondents: *Ranken, Ford & Chester.*

K. J. R. *Appeal dismissed.*

[*Reporter's Note*:—For an analogous case, see *Jhandoo Mal-Jagan Nath* v. *Phul Chand-Fateh Chand,* (1924) I. L R. 5 Lah. 497, where the English authorities on what is commonly called "anticipatory breach" of contract are discussed at length.—K.J.R.]

1. (1903) I. L. R. 28 B. 66.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—VISCOUNT SUMNER, LORD SHAW, LORD BLANESBURGH, LORD ATKIN AND SIR LANCELOT SANDERSON.*

Thakur Ashutosh Deo Ghatwal and another .. *Appellants** *(Judgment-Debtors)*

v.

Bansidhar Shroff .. *Respondent* *(Decree-holder)*.

P. C.

Thakur Ashutosh Deo Ghatwal *v.* Bansidhar Shroff.

Ghatwali tenure in Birbhum—Inalienability of—Effect of Sonthal Parganas Rural Police Regulation, 1910 *(Regulation IV of* 1910*)—Non-liability of tenure from sale in execution of decree.*

The Sonthal Parganas Rural Police Regulation, 1910, has not the effect of removing the inalienability of a *ghatwali* tenure in Birbhum and its consequent immunity from sale in execution of a personal decree against the *ghatwal* for the time being.

Judgment of the High Court reversed.

Appeal No. 73 of 1925 from a judgment and decree of the High Court, Patna (Ross and Dass, JJ.), dated the 9th December, 1924, which reversed a judgment and decree, dated the 15th September, 1923, of the Subordinate Judge of Deoghar.

The material facts of the case appear from their Lordships' judgment as well as from the report in the Court below [*see* I.L.R. 4 Pat. 272].

Upjohn, *K.C.* and *Dube* for appellants.

Dunne, K.C. and *Brown* for intervener (the Secretary of State for India in Council).

De Gruyther, K.C., Lowndes, K.C. and *Raikes* for respondent.

24th April, 1928. The judgment of their Lordships was delivered by

Viscount Sumner.

VISCOUNT SUMENR:—The appellant, the holder of a ghatwali tenure in Birbhum called Rohini, appeals from a decree of the High Court at Patna, which, reversing a decision of the Subordinate Judge of Deoghar, granted the petition of the respondent, a decree-holder, and ordered execution, by sale of the tenure, to proceed. The Secretary of State, intervening by leave, supports the appeal.

---

*P.C. Appeal No. 73 of 1925. 24th April, 1928.

P. C.

Thakur Ashutosh Deo Ghatwal v. Bansidhar Shroff.

Viscount Sumner.

Apart from the effect of the Sonthal Parganas Rural Police Regulation, 1910, whatever it may be, it is quite clear that no such order could be made. The inalienability of a ghatwali tenure is a settled principle of the general law [see *Rajah Nilmoni Singh* v. *Bakranath Singh*[1]] and, with regard to those in Birbhum, Bengal Regulation XXIX of 1814 and Act No. 5 of 1859, which the Regulation of 1910 does not purport to affect, have specifically affirmed it. The contention of the respondent is that the administrative arrangements laid down in the Regulation of 1910 have, in effect, commuted the whole of the ghatwal's personal services into a money payment and have accordingly removed the reason, which historically has been assigned as the explanation of this incident of ghatwali tenure. The Regulation of 1910 is itself plain enough, and nothing seems to turn on its mere construction. The principle of the decision below may be briefly said to have been an application of the maxim, *Cessante ratione legis cessat ipsa lex,* to the case of an established incident of a right to land.

The Regulation, which repeals and replaces a similar regulation of 1900, is designed to provide for the organisation of the Rural Police in the Sonthal Parganas generally, but, in providing for the pay of different police grades, it enacts by section 8 that, where a zemindar or undertenure holder holds subject to the condition, express or implied, of supporting the police within his zemindary or undertenure, he shall be liable to pay the amount of money required for such police. It is only by the definition section that the provisions of the regulation are applied to ghatwals at all, for, in defining the word "zemindar," section 3 adds "and includes also the ghatwals of Tapah Sarath Deoghar, whose tenures are subject to the provisions of the Bengal Ghatwali Lands Regulation, 1814."

The appellant succeeded the previous holder, his deceased cousin, in 1911, being duly appointed by the Deputy Commissioner of the Sonthal Parganas, and he executed, as usual, a muchilka, in an ancient and accustomed form, dated the 23rd October, 1911, by which, on his appointment, he undertook a variety of duties, most of them no doubt connected directly or indirectly with the "maintenance of the public peace" within his lands, partly by personal service, partly by constables and such like, employed for the purpose. It may be frankly recognised that, if relieved of that part of his obligations which would be dealt with under the regular system of the rural police, the residue

1. (1882) L. R. 9 I. A. 104.

P. C.
Thakur Ashutosh Deo Ghatwal v. Baraidhar Shroff.
Viscount Sumner.

of his duties would be neither onerous nor important. As is the case with many other ghatwals, his position might then be described as an interesting survival.

Accordingly, in so far as his duties fell to be performed by the rural police, they may be fairly said to have been commuted for a money payment, and section 8 itself provides that, in cases of default in payment, the Deputy Commissioner is to recover it by the "process prescribed for the recovery of arrears of Government revenue".

As between himself, as judgment debtor, and his judgment creditor no doubt the appellant has no merits; but the issue involved in this case is the wider one of the effect of this regulation upon the alienability of a ghatwali tenure in Birbhum generally. If the effect is that contended for, the tenure would pass to a purchaser by the sale alone, and would in future involve no further obligation on the holder, if so much, than payment of such police salaries as might attach to it. The Government would lose its power of forfeiting the tenure on failure of the holder to perform the conditions and of making a new grant to some more worthy ghatwal. Not only judgment-creditors would be entitled to sale, the ghatwal himself would be able to sell at will, for inalienability, if removed at all by the effect of the Regulation, must be removed for all. Apart from an actual repeal, which was the fate of the former Regulation in about a decade, this Regulation itself provides by section 2 for its own withdrawal by the Local Government from any portion of the Sonthal Parganas and also for its own restoration by the same authority. So far from being on its face a Regulation altering the general law as recognised by the above-quoted Regulation and Act, this local Regulation only brings in ghatwals as zemindars, incidentally and for the sake of uniformity. It was passed, *alio intuitu*, to make better provision for local police administration, and it is essentially of a temporary character and of shifting application. Nevertheless, the respondent has to contend that it has also incidentally terminated for ever an ancient characteristic of the ghatwali tenures to which it applies, not to be revived automatically on a withdrawal of the Regulation but only by some legislation in the future, which, unlike this Regulation, would have to be passed *ad hoc.*

If the contention be right, it was not the Regulation of 1910 but that of 1900 which really worked this novel and irrevocable change, for its provisions were essentially similar. If it be right,

P. C.
Thakur Ashutosh Deo Ghatwal v. Bansidhar Shroff.
Viscount Sumner.

the muchilka taken in 1911 was, as to many of its terms, wholly otiose, and the appointment made by Government was no longer a personal appointment in favour of the next heir as an act of State, but had really become, apart from its form, an unqualified admission, to be made, of course, in favour of any donee or vendee who could show a title.

On examining the muchilka, which need not be set out at length, there is a good deal which cannot be said to fall merely within the duties of rural police, and in this the Government was plainly imposing useless obligations, since on a sale they would remain with the alienating ghatwal, while his alienee would be free of them. Such obligations are the continuance of the old arrangements of Amlas; the escort of pilgrims through the ghatwal's *ilaka,* which is certainly not merely for their protection from the villagers or of the villagers from the pilgrims' thefts and violence; the obligation to lodge information as to crimes and other occurrences happening within the taluk; the refusal of all permission to bad characters to live within it; and the requirement of an annual list of Isimnavasi and of persons serving under the ghatwal. The words further contemplate a continuing obligation to appoint and be answerable for some peace officers of some sort apart from the constables appointed by and serving under the Local Government. They are as follows:—

"I will not allow any thief, badmash, or absconder to live within the jurisdiction of my taluk, neither will I plot or conspire against Government nor help others in doing the same. I will not discharge, without the order of Government, such persons under me who have been engaged in doing police duties; if it be found necessary to discharge any such person, I will first send an information thereof or report his faults to the authorities, and abide by such orders as will be passed by them."

Whatever may be done in actual practice, which may be little and of small moment, these words clearly import some kind of personal organisation, appointed, directed and discharged by the ghatwal, over and above or it may be under and subject to, the regular rural police, and out of that nucleus an important revival of the old ghatwali obligations might at any time arise.

In their Lordships' opinion the following propositions may be laid down:—

(1) Under the terms of his appointment the present ghatwal holds, under conditions which are more extensive than that of merely supporting within his zemindari the police, in respect of whom he has to pay the amount determined by the Deputy Commissioner, and which are also substantial enough to leave

P. C.

Thakur Ashutosh Deo Ghatwal v. Bansidhar Shroff.

Viscount Sumner.

his inability to alienate unaffected, as if the Regulation and its predecessors had not passed.

(2) The Regulation contains nothing, which can be construed as or operates to the same effect as a release or discharge of the Government's right to have the inalienability of the tenure enforced unless and until it effectually puts an end to it. The rule on this point was thus laid down by the Board in *Narayan Singh* v. *Niranjan Chakravarti*[1]:

"To terminate the ghatwali character of the lands, it seems to their Lordships that it is necessary to find something done or omitted to be done on the part of the Government, as the grantors, which would have the legal effect of a surrender and regrant of the lands on new terms, or, at any rate, of a release of the right to appoint the ghatwal and call for the performance of the services."

What has here been done on the part of the Government is a mere provision for the machinery of police administration and had no such effect as that mentioned above.

(3) The maxim *Cessante ratione legis cessat ipsa lex*, or any corresponding rule has no application to the present case. The contention really amounts to a claim that a Court of Law can inquire into the present utility of an ancient incident of tenure and annul it and its enjoyment by the ruling power, whenever in its opinion the incident has survived its usefulness. This is a matter of policy, not of interpretation of a legislative instrument or of application of general law, and is beyond judicial powers.

Their Lordships are accordingly of opinion that the judgment appealed against should be reversed and that of the Subordinate Judge restored and that the respondent should pay to the appellant, Thakur Ashutosh Deo Ghatwal, his costs of this appeal and in the High Court at Patna and in the Court of the Subordinate Judge, and so they will humbly advise His Majesty.

Solicitors for appellants : *H. S. L. Polak.*

Solicitors for Secretary of State: *Solicitor, India Office.*

Solicitors for respondents: *Watkins and Hunter.*

K.J.R. *Appeal allowed.*

---

1. (1923) L. R, 51 I. A. 37 at 68,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Insolvency.*]

PRESENT:—MR. JUSTICE BEASLEY.

In the matter of R.K. Abdul Rahiman Sahib & Co. (*Insolvents*).

Madrassa Hasanatha Zaria Girls' School at Ambur by its Secretary, K. Hajee Abdul Lathief Sahib .. *Applicant**

v.

The Official Assignee of Madras .. *Respondent.*

In re Abdul Rahiman Sahib & Co.

Contract Act, S. 240—Partner—Lender receiving share of profits if and when a—Labbai or Ejman partnership—Muthalalis in—If partners—Ejmans and Kutalis in—Status of—Insolvency—Creditors—Trade creditors—Preference of, to other unsecured creditors—Indian and English Law—Distinction

Petitioner deposited money in a Labbai or "Ejman partnership", and received in return a share in the net profits of the business. There was no evidence as to what the intention was when the money was so deposited, except that he was to receive a portion of the profits. He had no voice in the management of the business and he was not present at the settlements at which the shares in the profits were assigned.

Held, that the petitioner was only a creditor of the firm and was not a partner in it.

The fact that a depositor of money in a business is to receive a share in the net profits of the business is not conclusive to show that he is a partner in the business. Although an agreement for participation in profit and loss is *prima facie* evidence of partnership between the contracting parties as between themselves, yet the question of partnership must in all cases depend upon the evidence of the parties as it appears on the contract.

Status and rights of Ejmans, Kutalis and Muthalalis in a Labbai or "Ejman partnership" considered.

There is no provision under the Indian Law for the preference of trade creditors to other unsecured creditors.

Motion to set aside the order of the Official Assignee refusing to admit the applicant as a creditor in the insolvency of R. K. Abdul Rahiman Sahib & Co.

K. S. Krishnaswami Aiyangar for applicant.

S. Duraiswami Aiyar for respondent.

The Court delivered the following

JUDGMENT:—This motion raises a question of great importance and interest because I have to consider the status of the classes of persons who are connected with the firms such

---

*I. P. No. 182 of 1922. 21st December, 1926.

In re Abdul Rahiman Sahib & Co.

as the insolvent firm here, a Labbai firm or what is sometimes known as an "Ejman partnership". My task has not been rendered any the easier by reason of the fact that though these Labbai firms are numerous in the Presidency and have been carried on for many years there has been no reported case in this Court which even considers the status of those persons who are connected with those firms merely by a deposit of money in the firm's business. That is the position of the petitioner here. He is a trustee of the Madrassa Girls' School at Ambur. The school was started in 1913 and K. Abdul Rahiman took a leading part in its foundation. Sums of money were set apart in the firm's books which became the school funds and an account was opened headed "Account of the Madrassa at Ambur". Into these accounts there were brought sums of money by the insolvent firm and the firm as it was then known and at every settling day sums of money were set apart for that school. In addition to the insolvent's firm setting apart sums of money for the school other sums were collected from outside people and credited to the account of the "Madrassa" in the firm's books.

There were three classes of persons connected with the firm, the ejmans, the kutalis and the muthalalis. It is in the latter class that the Madrassa School is. At each settlement the net profits of the business were divided up amongst these three classes of persons. To the muthalalis was apportioned one-third share and to the kutalis and ejmans two-thirds share. Ejmans are clearly partners. Kutalis are persons who, while contributing labour, do not contribute any money to the business. The muthalalis are persons who do not contribute labour to the business but contribute money. It is common ground that some of those persons who are ejmans are also muthalalis; that is to say, they contribute not only labour but money to the business and they not only receive money out of the one-third share but also out of the two-thirds share. With regard to the kutalis and ejmans definite proportions of the two-thirds shares are given to them. It is contended by the petitioners that this, though a fixed share, was liable to alteration at the times when the different settlements were arrived at and I think that that is so subject to this limitation that, if one of those kutalis or ejmans retired or died, the share of that person in the two-thirds share might be added to those who remained thereby increasing their share or a fresh ejman or kutali could be brought in to take over the share of the deceased or retiring kutali or ejman as the case might be. But what-

In re Abdul Rahiman Sahib & Co.

ever alteration there might be in the fixed share of these persons it was all within the limits of the two-thirds share of the net profits set apart for the kutalis and ejmans. There is this further observation to make with regard to the muthalalis. They have no voice in the management of the business whatsoever and are not present at the settlements. They seem to be persons who have merely deposited money in the business receiving their share of the net profits within the limits of the one-third share of those.

This motion comes before me under the following circumstances. The Madrassa claimed as a creditor of the insolvent's firm, which was adjudicated insolvent on the 5th December, 1922. By his order in July, 1924, the Official Assignee postponed this creditor for the reason that he thought that the trade creditors were to be preferred to all other unsecured creditors. In making that order the Official Assignee was clearly in error because although under the English Bankruptcy law trade creditors are preferred to other unsecured creditors there is no provision for such preference under the Indian law. When this mistake was brought to his notice he made a further report and disputed the claim of this creditor on the ground that this creditor was not a creditor but was a partner in the insolvent firm, and he has treated the money standing in the name of the Madrassa School as capital contributed to the business. Mr. K. S. Krishnaswami Aiyangar argues that this deposit was nothing more than an investment or a loan to the business and argues that because, according to Muhammadan Law and custom, Muhammadans are not allowed to pay or receive interest on loans the fiction has been resorted to by these Muhammadan firms of apportioning a share of the net profits to those who have deposited money in the business instead of paying interest to them in the ordinary way on their loans. No doubt there is a great deal to be said for that contention; but that Muhammadan law or custom is not so rigid as is contended for, is within the experience of most of the judges who have sat on the Original Side of this High Court; because it is within our experience that Muhammadans do in certain cases both pay and receive interest. I do not propose to examine in detail the various settlements arrived at by this firm. The first settlement was on the 10th February, 1914, the second on the 29th October, 1917, the third on the 21st May, 1918, the fourth on the 31st March, 1919 and the fifth on the 31st March, 1920. A statement was put in with regard to the 1914 settlement which

In re Abdul Rahiman Sahib & Co.

I think gives a very fair indication of the practice of this firm. That, as I say, I do not propose to examine in detail. It shows the shares of the ejmans and kutalis and it also shows the amounts standing to the credit of the muthalalis and what the latter are entitled to as their one-third share of the net profits. What would have guided me very much in this case would have been evidence as to custom. This is an unusual kind of business, though there are many such, and I should have thought that some evidence as to the status of the three classes connected with the business would have been obtainable and that I should have had the evidence before me showing what would happen or has happened where at a settlement instead of there being any net profits the business has resulted in a loss. I should then have had before me evidence as to whether the muthalalis were liable for any of the losses of the firm. Neither side has chosen to adduce any such evidence, and since at none of the settlements of this firm was there anything else but profit the practice of this firm with regard to that has not helped me. It is true that K. Abdul Rahim who is one of the insolvents was called by the petitioner and he has stated that the ejmans are partners, the kutalis are working partners and that the muthalalis are not partners. I have had to consider whether this witness has come forward in the interest of justice to assist the Court or whether he has not some interested motive in coming here and giving the evidence which he has done. I prefer to adopt the latter alternative, and I do not think that it would be right for me to accept the evidence of this witness on the question as to whether or not muthalalis are partners in this business. Much reliance is placed by the petitioner upon the fact that the muthalalis have no voice in the management of the business and that they are not present at any of the settlements and that they can when they chose withdraw the money they have deposited in the firm. That is quite true, but I think upon the evidence that the ejmans and the kutalis can also withdraw from the firm as and when they desire. So that that point is not one which helps the petitioners. The difficulty in this case is that there was no agreement at all when the muthalalis deposited their money in the business except that they were to receive a portion of the one-third share assigned to the muthalalis. Thus the individual share of each muthalali would, of course, vary not only with the amount of the net profits but also because other muthalalis could and might have deposited more money in the business thereby diminishing the share of the

In re Abdul Rahiman Sahib & Co.

other muthalalis in the one-third share of the net profits. The individual share, therefore, of each muthalali would not only be fluctuating with the net profits but also by reason of the number and amount of the contribution of the other muthalalis. There is very little in this case to gather what the intention was when the money was so deposited in the business by the muthalalis and that after all seems to me to be the whole question in this case. The fact that a depositor of money in a business is to receive a share in the net profits of the business has since the decision of *Cox* v. *Hickman*[1] not been a conclusive test. That case decided that persons who share the profits of a business do not incur the liabilities of partners unless that business is carried on by themselves personally or by others as their real or ostensible agents. This decision brought about a substantial modification of the law as it stood prior to this decision. In the old case of *Grace* v. *Smith*[2] De Grey, Chief Justice, laid down the proposition that "every man who has the share of the profits of a trade ought also to bear his share of the loss" and in *Waugh* v. *Carver*[3] this doctrine was discussed and approved and from that time until the decision in *Cox* v. *Hickman*[1] it was considered as clearly established that by the Law of England all persons who share the profits of a business incurred the liabilities of partners therein although no partnership between themselves might have been contemplated. In *Mollwo, March & Co.* v. *The Court of Wards*,[4] *Cox* v. *Hickman*[1] was acted upon and it was held in that case that "although a right to participate in profits of a trade is a strong test of partnership and there may be cases where from such a participation alone it may as a presumption, not of law but of fact, be inferred, yet, whether that relation does or does not exist must depend on the real intention and contract of the parties." In *Walker* v. *Hirsch*[5] it was held that "although an agreement for participation in profit and loss is *prima facie* evidence of partnership between the contracting parties as between themselves, yet the question of partnership must in all cases depend upon the evidence of the parties as it appears on the contract", and it appears to me that it is the intention of the parties that is to be looked to in all such cases. It really narrows itself down to that question. The same view was expressed in *Ex parte Tennant, In re Howard*[6] where it was held that participa-

1. (1860) 8 H. L. 268.
2. (1775) 2 Wm. Bl. 998.
3. (1793) 2 Hy. Bl. 235.
4. (1872) L. R. 4 P. C. 419.
5. (1884) L. R. 27 Ch. D. 460.
6. (1877) L. R. 6 Ch. D. 303.

In re Abdul Rahiman Sahib & Co.

tion in profits is not conclusive evidence as to the existence of a partnership. It is very cogent evidence and if it stands alone may be conclusive evidence of a partnership, but the fact of the participation in profits must be considered in the light of other circumstances. In *Badeley* v. *Consolidated Bank*[7] the decision is to the same effect. I therefore cannot take the fact of participation by the muthalalis—and it is admitted by Mr. Duraiswami Aiyar on behalf of the Official Assignee—in the net profits of the business as conclusive on the question of partnership. I have, therefore, to consider the other circumstances of the case and I am bound to say that they are not very helpful. Neither does the examination of the Contract Act give me any assistance because section 240 of that Act says that the mere sharing of the profits does not create a partnership. Then, can the ejman and the kutalis be said to be carrying on this business as agents for the muthalalis for the benefit of all of them? To the extent that the ejmans and the kutalis work the business and that the profits in which the muthalalis have a share depend upon their endeavour it can be said that they are carrying on the business for the benefit of all of them; but I do not think that they can really be described as the agents of the muthalalis. Then it must be remembered that the muthalalis have no voice whatever in the management of the business. They cannot object to additional muthalalis coming into the business which may have the effect of decreasing their share in the net profits and the number of muthalalis, it seems to me, can be unlimited. Muthalalis cannot object to other muthalalis withdrawing their deposit. All that they do is to deposit money and receive a share of the net profits if any. It is difficult to conceive a partnership with so many partners. Ordinarily, in a partnership, if the capital of the partnership is increased, it can only be done in consultation with the partners and the same observation applies to the taking in of another partner or other partners. Another feature of this business is that the death of a partner does not apparently put an end to the partnership nor does a retirement. It is obvious that, if the amounts deposited by the muthalalis are to be called capital, then the capital is a fluctuating amount depending upon fresh muthalalis coming in and others retiring. In this case there is no question of one muthalali retiring and another muthalali taking his place and taking over the amount deposited by the retiring muthalali. All these before-mentioned matters seem to me to be things which are

7. (1886) L. R. 38 Ch. D. 238.

In re Abdul Rahiman Sahib & Co.

not to be found in any ordinary partnership. As I have said, there is no evidence as to the intention of the muthalalis when they deposit their money. The only solid fact is that they receive a share in the net profits of the business. It does not seem to me to be sufficient to make the muthalalis partners in this business. There is this further question to be considered and it is this. Ordinarily, partners are entitled to a share in the good-will of the partnership business. There is nothing in evidence to show me whether muthalalis would be entitled to a share in the good-will of this business, but there is a decision of this Court to the effect that kutalis are not entitled to a share of the good-will of a business. That is a decision of Kumaraswami Sastri, J. in *Ramachandra Naidu* v. *Batcha Sahib.*[8] The head-note is as follows:—

"But in the peculiar kind of partnership, well known in this Presidency where the ejman or proprietor of the firm takes in what are called 'working partners' who ordinarily begin by putting in no capital, but who, as the business goes on, put in the profits earned in the business itself as part of the capital, the presumption to be made is that the working partner has no interest in the 'good will' until the contrary is shown."

On page 229, after some very valuable observations with regard to this type of partnership, Kumaraswami Sastri, J, says:

"I have not come across a single case either in my practice at the Bar or as a Judge where a working partner in a firm in which there are ejmans has ever got any share in the good-will. I do not think they ever claimed any share in the good-will till quite recently."

And earlier on page 229 he says:

"These partnerships consist of three classes of persons, the first ejmans or proprietors, the second muthalalis or persons who put in moneys to be used as capital and who get a share of the profits instead of interest in return and the third the working partners."

I do not think that the muthalalis can be put upon any higher place than the kutalis, and it seems quite clear that the kutalis cannot be regarded really as partners in the firm. As I have said before, I have had very little to guide me in this case but, in my view, for the reasons I have already stated, the muthalalis cannot be held to be partners in this type of business; and I must therefore hold that the Official Assignee is wrong in having rejected the claim of the applicant and I declare that the applicant is a creditor of the insolvency and is entitled to rank for dividend out of the assets with the other creditors.

8. (1917) 22 M.L.T. 225.

The Official Assignee will pay the taxed costs on the Original Side scale of this application. The Official Assignee will take his own taxed costs on the Original Side scale as between attorney and client out of the estate.

In re Abdul Rahiman Sahib & Co.

V. Varadaraja Mudaliar, attorney for applicant.

N. T. Shamanna, attorney for respondent.

A.S.V. *Motion allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE ANANTAKRISHNA AIYAR.

The Commissioner of Income-tax, Madras .. *Referring Officer**

v.

In the matter of the Income-tax assessment of P. Thiruvengada Mudaliar .. *Assessee.*

F. B. Commissioner of Income tax, Madras *v.* Thiruvengada Mudaliar.

Indian Income-tax Act (XI of 1922), Section 66 (2)—Point of law not raised in application before the Commissioner—If can be raised subsequently.

If a point of law is not raised before the Commissioner of Income-tax within the time specified by Section 66 (2) of the Indian Income-tax Act, it cannot be raised at all and the Commissioner cannot be required to state a case to the High Court raising that point.

In the matter of Lalla Mal Hardeo Das Cotton Spinning Mills, (1923) I.L.R. 46 A 1 and *In the matter of Makhan Lal Ram Sarup,* (1924) 23 A. L. J. 40 followed.

Case stated under Section 66 (3) of the Indian Income-tax Act XI of 1922 by the Commissioner of Income-tax, Madras, in the matter of the Income-tax assessment of P. Thiruvengada Mudaliar, the Assessee, in his Letter No. 516 of 1927, dated 15th July, 1927, for the decision of the High Court on the following questions, *viz.*:—

"(1) In a case where an assessee contends that he does not maintain accounts and the Income-tax Officer is of opinion that the assessee must have maintained accounts, whether such a state of affairs is one where the Income-tax Officer can base his assessment on figures appearing in a bank pass book without his being aware at the time that the pass book is not of the assessee alone but of the assessee and some other individual;

(2) Whether after the discovery that the pass book which was the basis of inference on the part of the Income-tax Officer was a joint account of assessee and of another, the Taxing Officer should not re-open the assessment for the purpose of finding out what were the amounts belonging exclusively to the assessee;

---

* Referred Case No. 16 of 1927. 14th December, 1927.

F. B.

Commissioner of Income-tax, Madras v. Thiruvengada Mudaliar.

(3) When a proposed order was sent on the evening of the 16th February, 1926 containing exhaustive figures and calculations based on figures alleged to have been taken from the pass book with reference to which assessee's objections were asked to be made so as to reach the Taxing Officer before 18th February, 1926 and the assessee has asked for four days' time to check the various figures and when such time was not given and assessment was made in terms of the draft order without giving sufficient opportunity to the assessee, could this refusal and assessment be considered to have been made after giving sufficient notice or opportunity to urge his objections to Income-tax Officer's estimate?

(4) Where in the absence of accounts, assessment was levied at an agreed figure as the result of negotiations by and on behalf of the assessee and the Income-tax Officer, whether the said assessment can be re-opened under section 34 on the same state of affairs, *viz*, 'absence of accounts' or by raising the same question in other words."

The Commissioner's reference was as follows:—

In accordance with the order quoted above I have the honour to refer the following case for the opinion of the Hon'ble the Judges of the High Court.

2. The petitioner is P. Thiruvengada Mudaliar of Madras. His chief source of income is that derived as ship dubash of Messrs. Volkart Brothers.

3. For the assessment of the year 1924-25 he returned an estimated income of Rs. 10,000 under the head "business".

4. The petitioner appeared in response to the Income-tax Officer's notice under Section 23 (2) of the Income-tax Act but failed to produce any accounts or other evidence to substantiate his return. His solicitor, Mr. Greatorex, suggested to the Income-tax Officer that Rs. 15,000 would be a reasonable estimate of his income from business. The Income-tax Officer estimated the income from this source to be Rs. 16,000 and completed the assessment on 26th August, 1924. Mr. Greatorex accepted the assessment.

5. In the course of the assessment for 1925-26 the Income-tax Officer received trustworthy information about the extent of the petitioner's business and was satisfied that the petitioner had materials from which his income from business could have been ascertained and that by withholding those materials he had managed to conceal a large part of his real income and had been under-assessed.

6. The Income-tax Officer, therefore, proposed to assess the profits and gains that in his opinion had escaped assessment in 1924-25 and served on the petitioner a notice under Section 34 calling on him to make a return of the income derived during the year of account 1923-24.

7. The petitioner made a return and after hearing the evidence produced by him in support of it the Income-tax Officer made

the assessment under Ss. 23 (3) and 34 on 18th February, 1926. A copy of his order is filed marked Ex. A.

8. The petitioner filed an appeal to the Assistant Commissioner against this assessment but it was dismissed. A copy of the Assistant Commissioner's order is filed marked Ex. B.

9. The petitioner then required the Commissioner to take the opinion of the High Court under Section 66 (2) on the following questions of law:

(*a*) "Whether in the event of the assessee's estimate of income not being accepted by the Income-tax Department whether without legal evidence conjectures on the part of the First Income-tax Officer could be the basis for taxation.

(*b*) "Whether the Income-tax Officer's estimate should not be founded upon definite evidence disclosed to the assessee; and

(*c*) "Whether the assessee should not be given an opportunity of disproving the correctness of the information received by the Taxing Officer and upon which he proposes to act."

The Commissioner held that no question of law arose and dismissed the application. A copy of his order is filed marked Ex. C.

10. The petitioner thereupon moved the High Court under Sec. 66 (3) of the Income-tax Act to direct the Commissioner to state a case on certain questions propounded by him in his notice of motion, a copy of which is appended marked Ex. D.

11. On 9th February, 1927 when the proceedings referred to in the preceding paragraph were pending before the High Court the petitioner filed another application before me and contended that the original assessment made on the 26th August, 1924 was made by negotiations between Mr. Greatorex on behalf of the assessee and the Income-tax Officer and that the Income-tax Officer had no power to take proceedings under Section 34 and make a fresh assessment in February, 1926. He requested me to cancel the latter assessment and in the alternative to refer to the High Court the question whether the Income-tax Officer was entitled in the above circumstances to act under Section 34. I considered that there was nothing to prevent the Income-tax Officer from taking action under Section 34 in the circumstances referred to above and as the petitioner's application under Section 66 (2) had already been disposed of and as there was no provision of law which could entitle an assessee at that stage to require me to state a case to the High Court, I refused to do so. A copy of this order is filed marked Ex. E.

12. The petitioner then applied to the High Court to amend his original application by substituting a new question of law in the place of those that he had already propounded. The High Court has now called on me to refer the following question :

F. B.
Commissioner of Income-tax, Madras
v.
Thiruvengada Mudaliar.

"Where, in the absence of accounts, assessment was levied at an agreed figure as the result of negotiations by and on behalf of the assessee and the Income-tax Officer, whether the said assessment can be re-opened under S 34 on the same state of affairs, namely, 'absence of accounts' or by raising the same question in other words".

13. Before I proceed to give my opinion on the question that I have been directed to refer, I respectfully request their Lordships to decide the preliminary question whether the petitioner is entitled to move the High Court for a direction to the Commissioner to refer a question of law which was not raised before the Commissioner in the course of proceedings under sub-section (2) of Section 66 of the Income-tax Act. The application presented to me on 9th February, 1927 was not a valid application under that sub-section. I have already raised this question in my reference to the High Court on the petitioner's assessment for 1925-26—(Referred Case No. 3 of 1927).

14. In my view the question that I have been directed to refer should be answered in the affirmative. It is not unusual for an Income-tax Officer to lay before an assessee the details of a proposed assessment and invite him to state whether he agrees to the figures. Such agreement is not recognised by the Statute and does not bar the assessee's right to appeal. The object of this procedure is merely to clarify the issues and to prevent as far as possible appeals due to mere misunderstanding on either side. This was done in the present instance and Mr. Greatorex on behalf of the assessee signified that he agreed to the adoption of the figure Rs. 16,000 as the income from business of the year of account 1923-24. There is nothing in these facts to support the theory of "assessment by negotiation" or to fetter the Income-tax Officer's legal right to take proceedings subsequently under Section 34 on receipt of fresh information.

Nugent Grant and *O. Thanikachalam Chettiar* instructed by *R. Ramachandra Chetty* for Assessee.

M. Patanjali Sastri, Special Counsel for Income-tax Officer.

The Court delivered the following

JUDGMENT:—The assessee moved the Commissioner of Income-tax, Madras, to refer to the High Court certain questions of law which he alleged arose in connection with the assessment made by the Income-tax Commissioner. The Income-tax Commissioner being of opinion that no question of law in connection with the said assessment arose declined to make any reference. Thereupon the assessee moved the High Court and the High Court by its order, dated the 9th March, 1926, directed the Income-tax Commissioner to state a case on three points mentioned in that order. Subsequently the assessee moved the High

F. B.

Commissioner of Income tax, Madras v. Thiruvengada Mudaliar.

Court to add a fourth point on which the Commissioner should be directed to state a case, the fourth point being:

"Where, in the absence of accounts, assessment was levied at an agreed figure as the result of negotiations by and on behalf of the assessee and the Income-tax Officer, whether the said assessment can be reopened under S. 34 on the same state of affairs, *viz*, 'absence of accounts' or by raising the same question in other words."

The High Court by its order, dated the 25th April, 1927, ordered that the Income-tax Commissioner should state a case with reference to the fourth point also. When the case went back to the Income-tax Commissioner the learned Commissioner raised a preliminary objection to his stating a case with reference to the fourth point. The preliminary objection to this reference taken by the Commissioner of Income-tax is that the question of law sought to be argued here is one which was not argued before him and that it cannot now be raised by reason of S. 66, sub-section (2) of the Income-tax Act which permits the assessee to apply within one month of the passing of the order under Section 31 and 32 of the Act to the Commissioner to refer questions of law to the High Court; and upon his refusal to state the case to apply to the High Court for an order directing the Commissioner to refer the case. It is admitted that the assessee did not raise before the Commissioner the question of law he seeks to argue here, *viz.*, question No. 4, within one month of the passing of the Commissioner's order under S. 34 of the Act. He raised the other question of law arising in the other three questions but not this one and the Commissioner now contends that the assessee cannot be heard upon this question. The facts of the case are that in the previous year's assessment the assessee was assessed at a figure which the Commissioner subsequently considered to have been too low and he accordingly proceeded to re-assess him under S. 34 increasing the assessment in the previous year. The only questions here are whether the assessee is bound to raise before the Commissioner in his application to him all questions of law relied upon by him and whether he can get a reference upon a question of law not raised by him before the Commissioner. We are clearly of opinion that he cannot do the latter. Under S. 66 (2) of the Income-tax Act the Commissioner may be required by the assessee to refer any question or questions of law arising upon the order. It is, we think, beyond doubt that that can only mean any question of law then raised before the Commissioner, not any question of law which the assessee may deem to be an arguable one thereafter. This view is also taken by the Allahabad High Court in

F. B.
Commissioner of Income-tax, Madras v. Thiruvengada Mudaliar.

In the matter of Lalla Mal Hardeo Das Cotton Spinning Mills[1] and *In the matter of Makhan Lal Ram Sarup.*[2] If the point of law is not raised before the Commissioner within the time specified by S. 66 (2) it cannot be raised at all and the Commissioner cannot be required to state a case raising that point. This is not an appeal to the High Court. No appeal to the High Court is given by the Act. Questions of law and not of fact may be referred to the High Court but only subject to the provisions of S. 66, sub-section (2), which only allows a reference upon such points of law as have been raised before the Commissioner within one month of the passing of the order.

The preliminary objection of the Commissioner to a reference on Question (4) succeeds and as the assessee does not propose to argue the other three questions referred it is not necessary for us to pass any orders except to order the assessee to pay the costs of the Commissioner which we fix at Rs. 250.

N. S. *Preliminary objection upheld.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE.

In re Taranagowd and others .. *Petitioners** (*Accused*).

In re Taranagowd.

Criminal Procedure Code, S. 107—Security given under—Commencement of period of—Date of final order under Section 118, or of preliminary order under Section 112—Joint trial of several accused under Section 107—Legality—Condition.

The date from which the period for which security is given under Section 107, Criminal Procedure Code, is to commence is the date of the final order made under Section 118, and not the date of the preliminary order under Section 112 of that Code.

In a case under Section 107, Criminal Procedure Code, the prosecution case was that the accused 2 to 7 were the hangers on of the 1st accused, and that owing to enmity between the 1st accused and P.W. 1, the 1st accused, along with his adherents, accused 2 to 7, were making P.W. 1's life in the village a burden to him, endeavouring to drive him from the village, and that all the accused combined with one purpose to bring about that result. The evidence was all directed towards that common purpose animating all the accused, namely, accused 1 urging the other accused to accomplish his purpose and the other accused carrying out in various ways petty acts of social tyranny and use of criminal force to aid and abet the 1st accused in his purpose And the evidence of witnesses who spoke to only some of the accused doing a particular act was relevant to prove the common purpose animating all of them.

---

* Cr. Rev. Case No. 912 of 1926. 16th February, 1927.

1. (1923) I. L. R. 46 A. 1. 2. (1924) 23 A. L.J. 40.

In re Taranagowd.

Held that, under the circumstances, the joint trial of all the accused was proper and was not illegal or prejudicial to the accused.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Sessions of the Bellary Division, dated 15th November, 1926, in Criminal Appeal No. 23 of 1926 preferred against the judgment of the Court of the Sub-divisional Magistrate of Bellary in Mis. Case No. 22 of 1926.

V. L. Ethiraj and *A. S. Sivakaminathan* for petitioners.

R. N. Aingar, for the Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT:—This Criminal Revision Case is against the order of the Sessions Judge of Bellary dismissing an appeal to him against an order of the Sub-divisional Magistrate of Bellary in a case under Section 107 of the Criminal Procedure Code. Two points are urged: (1) that the period for which security has been ordered to be given exceeds the period fixed in the preliminary order under Section 112; (2) that the joint trial of the petitioners was illegal and highly prejudiced them.

As to point (1), the preliminary order under Section 112 was drawn up apparently on 28th October 1925. Then the date has been struck out and 4th January, 1926, entered. That order called on the petitioners to show cause against giving security to keep the peace for one year, not, be it noted, for one year from that date. The final order was written and signed apparently on 20th September 1926 and pronounced on 2nd October, 1926. It is petitioners' contention that it is not open to the trial Court to order security for more than one year from the date of the preliminary order, that is at the furthest up to 4th January 1927. I am not prepared to accept this argument which would entail that in a case of this kind the time occupied by the trial would have to be subtracted from the period for which a security should be given. Such an interpretation of the law is bound to encourage accused persons in prolonging the trial as long as possible, since the longer they prolong it the shorter will be the time for which they will give security; in fact, were they successful in prolonging the trial for one year, they will escape having to give security at all, and render the whole proceedings something of a farce. I am clear that this was not the intention of the Code. Section 120, sub-section (2) lays down clearly that the period for which security shall be given shall commence on the date of the order under S. 118, that is the date of the final order.

In re Taranagowd.

As to the second point, the argument is that the joinder of the petitioners in one trial has prejudiced them because the lower Courts have considered the evidence as a whole against all the petitioners and thus have used against some petitioners evidence which was given only against others. There were seven accused and the general case against them was that accused 2 to 7 are the hangers on the 1st accused who is the village Reddi, and owing to enmity between the 1st accused and P.W. 1, the 1st accused along with these adherents of his, accused 2 to 7, have been making P.W. 1's life in the village a burden to him, endeavouring to have him boycotted by the coolies and barbers and to drive him from the village. The prosecution case was that all these accused combined with one purpose to bring about this result. I have studied the evidence as a whole and it is clear that it is all directed towards this common purpose animating all the accused, namely, accused 1 urging the other accused to accomplish his purpose and the other accused carrying out in various ways petty acts of social tyranny and use of criminal force to aid and abet the 1st accused in his purpose. It is not a case where evidence is given of isolated acts which have no relation to this common purpose. The evidence of witnesses who speak to only some of the accused doing a particular act is therefore in my view relevant to prove the common purpose animating all of them. In these circumstances it appears to me that the joint trial was proper and that no illegality or prejudice to the accused has occurred.

My attention has been called to a ruling of a single Judge of this Court reported in *Kutti Goundan, In re.*[1] It, however, can easily be distinguished on the facts. In that case two persons were put up jointly for giving security under Section 110, clauses (*d*), (*e*) and (*f*), that is, put shortly, for being habitual extortioners, mischief makers, and dangers to the community. The learned Judge held that the evidence regarding their association in their nefarious acts was not strong. That being so, he held that their joint trial prejudiced each of them. The case in *Hari Telang* v. *Queen-Empress*[2] was also a case under section 110, clauses (*d*), (*e*) and (*f*), and the Court held that it was improper to try jointly two persons charged under S. 110 (*f*), because it could not be said that their individual characters were so connected together that a joint trial on the ground that their characters render them dangerous persons

1. (1924) 47 M.L.J. 689. 2. (1900) I.L.R. 27 C. 781.

In re Taranagowd.

was permissible. The case in *Emperor* v. *Angnu Singh*[3] is very similar and in it also the learned Judge held that evidence connecting the various accused together was very vague, general and of a hearsay description.

This cautionary principle does not apply to the present case. The essence of it is that the petitioners formed one gang with one purpose, namely, that of harassing P.W. 1, and each act spoken to is an act prompted by that common object and directed towards accomplishing it. The evidence of the common association of all the petitioners for that one purpose was particularly strong.

I do not find that any objection on the ground of joint trial was taken before the trial Court, and it certainly was not made a ground of appeal before the Sessions Judge. In these circumstances I am not prepared to say that the joint trial was illegal or in any way prejudiced the accused. I am not prepared to interfere in this case and dismiss the petition.

A.S.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Maridu Gopayya .. *Petitioner* in Dis. No. 183 Magl. of 1927, dated 10th September, 1927, on the file of the Sub-Magistrate of Gudivada.*

Maridu Gopayya, *In re.*

Madras Local Boards Act (XIV of 1920), Sections 163, 212 (9), 219 and 221—Erection of pandal without obtaining license—Rights of Union Board—Union Board fixing a penalty—Power of Union Board to move Magistrate to recover the amount—Proceedings under S. 221—Defaulting party if can plead that no amount was due from him.

Where a person erects a pandal without applying for, and getting, a license before erecting it as required by section 163 of the Madras Local Boards Act, it is open to the Union Board to take action under sections 212 (9) and 219 of the Act. Under these sections, the Magistrate, after convicting the person for failure to obtain the license, can, in addition to the fine which may be imposed, recover and pay to the Union Board the amount of fee chargeable for the license. But there is no provision in the Act empowering the Union Board itself to fix a penalty for erecting the pandal without the license, nor can the Union Board levy fees without granting a license. If the Union Board levies fees without granting a license, the fees cannot be said to be "due" within the meaning of Sec. 221

---

* Cr. R. C. No. 784 of 1927. 29th November, 1927.

3. (1922) I.L.R. 45 A. 109.

Maridu Gopayya, *In re.*

of the Act and the Union Board cannot move the Magistrate under that section to recover such amount.

Obiter: In proceedings under section 221 of the Madras Local Boards Act, the defaulting party can plead by way of defence that no amount is due from him as he had not erected a pandal.

Case referred for the orders of the High Court under section 438 of the Crl. R. C. by the District Magistrate of Kistna in his Letter No. Cl. 7200, dated 10th October, 1927.

The Public Prosecutor for the Crown.

The Court delivered the following

Phillips, J.

ORDER:—*Phillips, J.*—The District Magistrate of Kistna has referred an order of the Sub-Magistrate of Gudivada under section 221 of the Madras Local Boards Act for revision.

One Gopayya had erected a pandal without the permission of the Union Board and the Board applied to the Sub-Magistrate under section 221 of the Local Boards Act for collection of the license fee due in respect of it. Admittedly no license was applied for or granted before the pandal was erected and it was open to the Board to take action under section 219 of the Act which provides a penalty not exceeding Rs. 50 for omission to take a license. Under section 212 (9) the Magistrate may also recover the amount of the fee chargeable from the accused. Instead of taking this action the Board took a lenient view of Gopayya's act and agreed to license the pandal on payment of the fee. This action cannot be said to be illegal and consequently if the fee thereby became payable the Board can apply for an order under section 221 as it did. Gopayya in the proceedings raised a plea that no fee was payable as he had not erected a pandal in contravention of section 163, but in accordance with the decision in *Ramachandran Servai* v. *President, Union Board, Karaikudi,*[1] the Sub-Magistrate declined to decide that point on the ground that it was not open to him to entertain such a plea. This view was taken in *Ramachandran Servai* v. *President, Union Board, Karaikudi*[1] by a Bench of this Court consisting of Devadoss and Wallace, JJ., but in a later case *Union Board, Paramakudi* v. *Chellaswami Thevar*[2] Waller, J., was of opinion that this decision was open to doubt. Devadoss, J., did not express the same opinion but did not repeat the view taken by him in *Ramachandran Servai* v. *President, Union Board, Karaikudi.*[1] Under section 221 the amount or apportionment of the sum to be recovered shall be ascertained by such Magistrate after enquiry,

1. (1925) I.L.R. 49 M. 888: 49 M.L.J. 356.
2. (1926) M.W.N. 676.

Maridu Gopayya *In re.*

Phillips, J.

and it is difficult to understand why when he has that power it should not be open to him to decide that the amount is *nil*. The anomaly pointed out by Wallace, J., is that such a view would amount to the Magistrate being set up as a final Judge over the Local Board. When, however, it is remembered that the Board has applied to the Magistrate for the recovery of the dues it is not open to the Magistrate to decide the case summarily and recover the amount without enquiry and he must be satisfied before he issues the order that such order is correct. If the offender had been prosecuted under section 219 he would be able to plead that no offence had been committed by him, and therefore on the facts of this case it is difficult to hold that he must be precluded from such a defence because a different form of procedure has been taken against him.

However this point need not be decided here for Gopayya made no application for a license and no license has been issued. If then there has been no grant of license the license fee payable under the Act cannot be said to be due within the meaning of section 221 and that section is inapplicable. The order of the Sub-Magistrate is therefore wrong and must be set aside, leaving the Board to take such further action as they think fit.

Madhavan Nair, J.

Madhavan Nair, J.—The question for consideration is whether the Union Board can move the Magistrate under section 221 of the Local Boards Act to recover the penalty imposed by it upon a person who erected a pandal without obtaining a license from the Board under section 163 of the Act. It is admitted that no license was applied for and none was granted by the Union Board.

To meet cases of this kind the Act has made provision in sections 212 (9) and 219. Acting under these sections the Magistrate after convicting the person for failure to obtain a license can, in addition to the fine which may be imposed, recover and pay to the Local Board the amount of fee chargeable for the license. There is no provision in the Act empowering the Local Board to fix a penalty for erecting a pandal without a license as there is, for example, provision for levying a fine for unauthorised encroachment under section 164 of the Act which may be recovered under section 221. Nor can the Local Board levy fees without granting a license. No doubt under section 163 the Local Board can recover the cost of removing an obstruction on a public road but it is not suggested that amount sought to be recovered in this case represents such cost. In these circumstances it seems to me that the license fee has not become due

Maridu Gopayya, In re.

Madhavan Nair, J.

under the Act within the meaning of section 221. The Sub-Magistrate has, therefore, no jurisdiction to proceed under that section and recover the amount. His order must be set aside.

In this view, it is not necessary to consider whether in a proper case under section 221 the defaulting party can plead by way of defence that no amount is due from him as he had not erected a pandal. On this point there is a conflict of authority in this Court (see *Ramachandran Servai* v. *President, Union Board, Karaikudi*[1]: *contra* per Waller, J., in *Union Board, Paramakudi v. Chellaswami Thevar*[2]). For the reasons given by my learned brother, I am inclined to hold that it is open to the defaulting party to put forward such a plea.

N.S. *Order of the Sub-Magistrate set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Rajagopala Aiyangar and others .. *Appellants* (Plffs.)*

v.

Srinivasa Raghava Aiyangar and others .. *Respondents (Defts. Nos. 1 to 7, 9 to 12 and 14 to 19).*

Rajagopala Aiyangar v. Srinivasa Raghava Aiyangar.

Hindu Law—Joint family—Alienation by father—Eldest son not impeaching the alienation within the period of limitation—Suit by the younger sons impeaching the alienation—Maintainability

A suit by the younger sons of a Hindu father impeaching the alienations made, when they were minors, by their father, who was impleaded as a defendant in the suit, as not binding on them, and brought within three years after the seniormost of them attained majority is not barred by limitation, because their eldest brother who was a major on the date of the alienation did not contest them within the period of limitation prescribed by the Limitation Act.

Jawahir Singh v. *Udai Parkash*, (1925) I L R 48 All 152: 50 M L J 344 (P.C.) followed.

Doraisami Serumadan v. *Nondisami Saluvan*, (1912) I L R 38 Mad. 118: 25 M L J 405 (F B) and *Gottukkula Surapa Raju* v. *Gottukkula Venkayya*, (1915) M W N 908, not followed.

Appeal against the decree of the Court of the Subordinate Judge of Tanjore in O.S. No. 12 of 1920.

P. R. Srinivasan for appellants.

K. Bhashyam Aiyangar with *K. S. Champakesa Aiyangar*, *R. Gopalaswami Aiyangar* and *V. Sundaresa Aiyar* for respondents.

---

* Appeal No 288 of 1923. 1st December, 1927.

1. (1925) I.L.R. 49 M. 888: 49 M.L.J. 356. 2. (1926) M.W.N. 676.

Rajagopala Aiyangar v. Srinivasa Raghava Aiyangar.

Kumaraswami Sastri, J.

The Court delivered the following

JUDGMENTS:—*Kumaraswami Sastri, J.*—This appeal arises out of a suit filed by the plaintiffs who are the sons of the 1st defendant for partition and for setting aside the alienations made by the father, the 1st defendant.

The case of the plaintiffs was that they and the 1st defendant were members of an undivided Hindu family and that the father, the 1st defendant, made certain alienations which they impeach as not binding on them for the reasons given in the plaint. Several issues were raised. It is only necessary to consider issues 5 and 6. The Subordinate Judge dismissed the suit on the preliminary point that the suit was barred by limitation, because the 25th defendant, the elder brother of the plaintiffs, who was a major, did not contest the alienations within the period of limitation prescribed by the Limitation Act and that consequently the plaintiffs who were his brothers were barred even though the suit was brought within three years after the 1st plaintiff attained majority and even though plaintiffs 2, 3 and 4 are still minors. The Subordinate Judge relies upon the decision in *Doraisami Serumadan* v. *Nondisami Saluvan*[1] as clear authority for the position that the suit is barred. He also relies on a subsequent case *Gottukkula Surapa Raju* v. *Gottukkula Venkayya.*[2] It is contended for the appellants that the suit is not barred by limitation as the alienations were by the father who was alive at the date of the suit and who was the managing member and it was not competent for the 25th defendant to give a valid discharge or make the alienations binding on the plaintiffs. We think the present case is clearly within the ruling of the Privy Council in *Jawahir Singh* v. *Udai Parkash.*[3] In that case a Hindu father had sold certain properties and a suit was brought by his younger son within three years after his attaining majority though the elder son had attained majority more than three years earlier and had allowed his claim to set aside the alienations to become barred. Their Lordships of the Privy Council held that the suit brought by the younger son within three years of attaining majority was not barred by limitation. It appears from page 154 of the judgment that the High Court of Allahabad against whose judgment this present appeal was before the Privy Council relied on the decisions of *Ganga*

---

1. (1912) I.L.R. 38 M. 118: 25 M.L.J. 405 (F.B.).
2. (1915) M.W.N. 908.
3. (1925) I.L.R. 48 A. 152: 50 M.L.J. 344 (P.C.).

Rajagopala Aiyangar v. Srinivasa Raghava Aiyangar.

Kumaraswami Sastri, J.

Dayal v. *Mani Ram*,[4] and differed from the view taken by the Madras High Court in *Vigneswara* v. *Bapayya*[5] and in *Doraisami* v. *Nondisami*.[1]

Their Lordships of the Privy Council observe as follows:—

"On appeal to the High Court the learned Judges overruled the plea of limitation. They relied on the decisions of their own Court (*Ganga Dayal* v. *Mani Ram*[4] and in a later case) and differing from the view taken by the Madras High Court in *Vigneswara* v. *Bapayya*[5] and *Doraisami* v. *Nondisami*[1] on which the Subordinate Judge had rested his judgment, they held that the conduct of Fateh Singh, the eldest brother, did not affect the undoubted rights of the plaintiffs."

Then dealing with the question of limitation what their Lordships of the Privy Council say is that they concur with the High Court and that they are of opinion that there is no substance in the appeal. It is clear from a perusal of this report that their Lordships of the Privy Council adopted the view taken by the Allahabad High Court which was against the view taken by the Madras High Court in *Vigneswara* v. *Bapayya*[5] and *Doraisami* v. *Nondisami*.[1] We find it difficult to distinguish the facts of the present case from the case of the Privy Council. We may also point out that in *Narayana Naicken* v. *Venkataswami Naicken*,[6] Devadoss and Wallace, JJ., held following *Jawahir Singh* v. *Udai Parkash*,[3] that a suit to set aside a sale by a younger son within three years of attaining majority would not be barred because his elder brother had not filed a suit within the time and allowed his claim to become barred. The fact that in *Jawahir Singh* v. *Udai Parkash*[3] the Privy Council recognised the joint cause of action does not help the respondents in this case very much because the question is whether a valid discharge can be given and there is no authority for holding that one brother can give a valid discharge. We are of opinion that the Subordinate Judge was wrong in holding that the suit was barred by limitation and dismissing the suit on the preliminary question.

It is argued before us that plaintiffs 2 to 4 are minors and were born after the alienations and therefore they have no cause of action. Issue 6 has been raised as to whether plaintiffs 2 to 4 are entitled to maintain this suit, and that has not been disposed

1. (1912) I.L.R. 38 M. 118: 25 M.L.J. 405 (F.B.).
3. (1925) I.L.R. 48 A. 152: 50 M.L.J. 344 (P.C.).
4. (1908) I.L.R. 31 A. 156.
5. (1893) I.L.R. 16 M. 436: 3 M.L.J. 216.
6. (1926) 51 M.L.J. 845.

Rajagopala Aiyangar v. Srinivasa Raghava Aiyangar.

Kumaraswami Sastri, J.

of by the Subordinate Judge. We do not know what grounds may be urged in support of their claim.

We reverse the decision of the lower court and remand the suit for disposal on the issues raised in the case. We think the costs of the appeal will abide and follow the result of this suit. The costs of the respondents who appear before us here will abide and follow the result.

Reilly, J.

Reilly, J.—I agree. It is true, as has been argued by Mr. Champakesa Aiyangar, that we have not before us the judgment of the Allahabad High Court which was under appeal before their Lordships of the Privy Council and that in their Lordships' judgment they merely say that on the question of limitation they agree with the Allahabad High Court. But from the statement of facts in the report it is clear that their Lordships were dealing with facts similar to those of the present case and that the decision that that suit was not barred by limitation must apply to the present suit.

N.S. *Appeal allowed and suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE DEVADOSS.

Gandham China Brahmayya .. *Appellant* (3rd Deft.)*

v.

Pappusetty Gangulu and others .. *Respondents (Plffs. and Dfts.)*

China Brahmayya v. Pappusetty Gangulu.

Madras Revenue Recovery Act (II of 1864), Ss. 37-A and 38—Collector—Meaning of—Revenue Divisional Officer—Order by, confirming the sale—Power of District Collector or the Board of Revenue to interfere with the sale—Regulation VII of 1828—If governs Act II of 1864.

A Revenue Divisional Officer is a "Collector" within the meaning of Ss 37-A and 38 of the Madras Revenue Recovery Act and consequently he is the only officer to confirm the sale or to set aside the sale acting under the proviso to S. 38, clause (3) of the Act. If he has confirmed the sale and has not chosen to exercise his power under the proviso, the sale becomes final and unimpeachable and neither the District Collector acting under the general powers of revision under Regulation VII of 1828 nor the Board of Revenue has any jurisdiction to interfere with the sale.

The provisions of the Madras Revenue Recovery Act are complete and cannot be affected by a general Act like Regulation VII of 1828.

Appeal against the decree of the Court of the Subordinate Judge of Narsapur in A.S. No. 155 of 1924 preferred against the

*C.M.A. No. 198 of 1926. 5th January, 1928.

China Brahmayya v. Pappusetty Gangulu.

decree of the Court of the District Munsif of Bhimavaram in O.S. No. 603 of 1922.

B. Satyanarayana for appellant.

V. Viyanna for respondents.

The Court delivered the following

JUDGMENT:—The sale was confirmed by the Revenue Divisional Officer on 9th August 1918. There is no doubt that the Revenue Divisional Officer is a "Collector" within the meaning of the sections 37-A & 38 of the Revenue Recovery Act. *See* Madras Act I of 1891, section 3, clause 6 taken with Regulation VII of 1828. If he was a Collector within the meaning of section 38, he is the only officer to confirm the sale or to set aside the sale acting under the proviso to section 38, clause (3). He has confirmed the sale and did not choose to exercise his power under the proviso. The result is, the sale has become final and unimpeachable. Neither the District Collector acting under the general powers of revision under Regulation VII of 1828, nor the Board of Revenue has any jurisdiction to interfere with the sale. The provisions of Madras Act II of 1864 are complete and cannot be affected by a general Act like Regulation VII of 1828. See *Sundaram Aiyangar* v. *Ramaswami Aiyangar.*[1] The order of the Collector (Ex. A) is null and void.

The plaintiff's suit for declaration is maintainable as the 3rd defendant was not in possession at the date of the suit.

The appeal against order is dismissed with costs.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRIAR AND MR. JUSTICE REILLY.

Ramaswami Chettiar *alias* Veerappa Chettiar and others .. *Appellants** (*Defts.*)

v.

Tyagaraja Pillai and others .. *Respondents* (*Plffs.*).

Ramaswami Chettiar v. Tyagaraja Pillai.

Civil Procedure Code (V of 1908), O. 13, R 1—Civil Rules of Practice, Rule 64—Court not passing an order for the production of documents or the filing of the list of documents—Party producing documents at the date of hearing—Order summarily rejecting them—Propriety of.

At the time of settling the issues in a suit, no order was passed by the Subordinate Judge as to the lists of documents or the production of

* A.S. No. 404 of 1923 and C.M.P. No. 2925 of 1924. 4th January, 1928.

1. (1918) I.L.R. 41 M. 955: 35 M.L.J. 177.

Ramaswami Chettiar v. Tyagaraja Pillai.

documents. The case was transferred to another Subordinate Judge after settlement of issues and was taken up for trial after some adjournments. On the date of hearing, the defendant's vakil filed an application to receive certain documents which consisted of certified copies of decrees and orders obtained from Courts, registration copies of documents obtained from the Sub-Registrar's Office, and other documents. The Subordinate Judge dismissed the application on the ground that the documents had not been filed earlier.

Held that, as no orders had been passed either under Order 13, Rule 1 of the Civil Procedure Code or under Rule 64 of the Civil Rules of Practice directing the parties to produce the documents or to file a list of documents, the Subordinate Judge was wrong in summarily rejecting the documents which were tendered at the date of the hearing.

A.S. No. 404 of 1923:—Appeal against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram, dated 15th March, 1923 in O.S. No. 27 of 1922.

C.M.P. No. 2925 of 1924:—Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to admit in evidence the documents filed therewith in A.S. No. 404 of 1923, preferred against the decree of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram in O.S. No. 27 of 1922.

M. S. Vydianatha Aiyar and *N. Chandrasekhara Aiyar* for appellants.

N. Muthuswami Aiyar for respondents.

The Court delivered the following

JUDGMENTS:—*Kumaraswami Sastri, J.*—This appeal arises out of a suit filed by the respondents to recover the balance of purchase money claimed under a sale deed filed as Ex. A in this case. The defendants raised various defences and pleaded that nothing was due. The issues were settled on the 1st of September, 1922. When the issues were settled no order was passed as to the lists of documents or the production of documents. After settlement of issues, the case was transferred to the Additional Sub-Court, East Tanjore, at Mayavaram and after some adjournments the case was taken up for hearing on the 15th of March, 1923. On that date the defendant's vakil filed two applications. One was an application to receive certain documents and the other was an application for an adjournment. The documents which they wanted the Court to receive consisted of certified copies of certain decrees and orders obtained from Courts, registration copies of certain documents obtained from

Kumaraswami Sastri, J.

Ramaswami Chettiar v. Tyagaraja Pillai. — Kumaraswami Sastri, J.

the Sub-Registrar's Office, sale certificates issued in Suit No. 48 of 1913, which it is alleged refers to some properties now in dispute, printed copies of plaints, sale proclamations in two suits, Suit No. 38 of 1914 and Suit No. 48 of 1914, and ledgers which it is alleged were filed in another Court. The Subordinate Judge dismissed the application for receiving the documents in evidence on the ground that they had not been filed earlier and also refused an adjournment and he went into the case and passed a decree for Rs. 15,213 and odd. Neither party adduced any evidence.

The appellants argue that the Judge was wrong in refusing to receive the documents which they tendered and that he ought not to have refused an adjournment in this case but should have allowed the defendants an opportunity of filing and proving the documents, which, as already pointed out, consisted mainly of certified copies and registration copies of documents.

The main question in this case is whether the learned Judge was right in refusing to receive these documents. Order 13, Rules 1 and 2 relate to the production of documentary evidence at the first hearing. Rule 1 says that the parties or their pleaders shall produce, at the first hearing of the suit, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents which the Court has ordered to be produced. Sub-clause (2) says that the Court shall receive the documents so produced; provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs. Rule 2 provides that documentary evidence not produced as required by Rule 1 shall not be received in a subsequent stage of the proceedings unless good cause is shown to the satisfaction of the Court for the non-production thereof. The Court has in such cases to record reasons for receiving documents not produced at an earlier stage. Rule 64 of the Civil Rules of Practice provides for cases where the Court does not call for the production of documentary evidence under Order 13, Rule 1. It says that in such cases it shall direct the defendant to file in Court a list of documents on which he intends to rely and shall fix a time for the production thereof. The list is to be in Form No. 16, and shall be signed and verified by the party filing the same or by his pleader. In the present case, no orders were passed either under Order 13, Rule 1 or

Ramaswami Chettiar v. Tyagaraja Pillai.

Kumaraswami Sastri, J.

under Rule 64 of the Rules of Practice, so that there was no direction for the parties to produce the documents and no direction that a list should be filed. Under these circumstances, the question arises whether the Judge was right in rejecting the documents produced at the trial. Even if there was an order passed, considerable discretion is allowed to the courts in cases where the documents are either public documents or are certified copies or where there is no reasonable doubt as to their genuineness. We have been referred to *Ranchhod* v. *Secretary of State for India*,[1] *Talewar Singh* v. *Bhagwan Das*,[2] *Jagdip Pandey* v. *Taibunnissa*[3] and *Chidambara Chettiar* v. *Parvathi Achi*.[4] The discretion of Courts to admit documents has also been considered by the Privy Council in *Imambandi* v. *Mutsaddi*.[5] I think, therefore, in the present case the Judge was wrong in summarily rejecting the documents which were tendered at the date of the hearing. The difficulty was mainly caused by the procedure adopted by the Vakil for the appellants who assumed that there was some default and put in a petition for the admission of these documents. He should also have put in his clients in the box and proved the facts, but he adduced no evidence. Having regard to these facts and to the unsatisfactory way in which the case has been disposed of in the absence of important documents, I think that the proper course will be to reverse the decree of the lower Court and to send the case back for disposal directing the Sub-Court, Mayavaram, to receive in evidence the documents sought to be tendered, admitting such documents which are certified copies of public documents and which require no further proof. If there are any other documents which the parties want to file, I think the Court ought to consider each document on its own merits and receive such documents as to which there is reasonable explanation for non-production, or as to which there can be no doubt as to genuineness. He will pass the necessary orders under Order 13, Rules 1 and 2, Civil Procedure Code or the Civil Rules of Practice before fixing a date for the trial.

As regards costs, I think that as the appellants have been dilatory in this case, they should pay the costs of the respondents in the High Court, and as regards costs in the first Court,

1. (1896) I.L.R. 22 B. 173 2. (1907) 12 C.W.N. 312.
3. (1923) 72 I.C. 397. 4. (1924) 87 I.C. 351.
5. (1918) I.L.R. 45 C. 878: 35 M.L.J. 422 (P.C.).

Ramaswami Chettiar v. Tyagaraja Pillai. — Kumaraswami Sastri, J.

they should pay the day costs incurred by the plaintiffs on the 15th of March, 1923. The other costs of the suit will abide and follow the result of the decree.

The appellants are entitled to the refund of the Court-fee paid in this Court for the appeal.

No separate order is necessary on the petition to receive documents.

Reilly, J.

Reilly, J.—I agree. I may add that it appears to me desirable that Rule 64 of our Civil Rules of Practice and Rules 1 and 2 of Order 13, Civil Procedure Code, should be brought into accord with each other by amendment.

N.S. *Appeal allowed and suit remanded to lower Court for disposal.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[*Insolvency.*]

PRESENT:—MR. JUSTICE WALLER.

In the matter of M. Venkataratnam Naidu (*Insolvent*).

The Official Assignee of Madras .. *Applicant**

v.

Ranganayaki Ammal and another .. *Insolvent and Respondent.*

The Official Assignee of Madras v. Ranganayaki Ammal.

Provident Funds Act (XIX of 1925), S 3 (1)—Scope of—Deposits in Railway Provident Fund—Insolvent drawing out the same and redeeming the pledge of his wife's jewels with a part of it and paying the balance to her—Right of Official Assignee to the amount.

Section 3 (1) of the Provident Funds Act is intended to protect compulsory deposits only so long as they remain deposited in the fund.

Where the insolvent drew out the deposits that stood to his credit in the Railway Provident Fund and with part of them redeemed some of his wife's jewellery and handed over the balance to her,

Held, that the Official Assignee had a claim on the sums drawn by the insolvent and the proper order to be passed was to the effect that the wife should pay to the Official Assignee the amount of the fund handed over to her and that the Official Assignee will have a charge on the redeemed jewels which must be handed over to him.

Nagindas Bhukhandas v. *Ghelabhai Gulabdas,* (1919) I.L.R. 44 B. 673 not followed.

The Official Assignee in person.

---

*I.P. No. 317 of 1927. 21st March, 1928.
Application No 117 of 1928. 26th March, 1928.

V. K. John instructed by *M. S. Krishnaswami Aiyangar* for 1st respondent.

The Official Assignee of Madras v. Ranganayaki Ammal.

O. Thanikachalam Chettiar instructed by *R. Ramachandra Chettiar* for 2nd respondent.

The Court delivered the following

JUDGMENT:—This case raises a somewhat difficult question. The insolvent has drawn out the deposits that stood to his credit in the Railway Provident Fund. With part of them he redeemed some of his wife's jewellery and the balance he handed over to her. The question is whether the Official Assignee has any claim on them. It is strenuously contended on behalf of the insolvent and his wife that the Official Assignee has no such claim. Section 3 (1) of the Provident Funds Act of 1925 is, no doubt, very widely expressed, but it seems to me that the short answer to the question propounded is that the sub-section is intended to protect compulsory deposits only so long as they remain deposited in the fund. A number of decisions has been cited, but most of them do not touch the point that has now arisen. *Veerchand* v. *B. B. and C. I. Railway*[1] was the case of a depositor who had retired from service, but had not yet drawn out his deposits. The decision was that they could not be attached while "in the company's hands". *The Secretary of State for India in Council* v. *Rajkumar Mukherjee*[2] was a similar case and was similarly decided. Richardson, J., remarked:

"In other words, as long as the deposits subsist in the fund, so long, at any rate, both as matter of legal construction and in the common and ordinary way of speaking, they are properly and correctly described as compulsory deposits . . . . . under S. 4 of the Act, they are not liable to attachment".

In *Hindley* v. *Joynarain Marwari*,[3] Rankin, J., observed:

"Whether the employee is in the service or out of the service, whether he be alive or dead, his share is unattachable in the hands of the institution".

The only case that is really in point is *Nagindas Bhukhandas* v. *Ghelabhai Gulabdas*.[4] There, as here, the insolvent drew out what stood to his credit in the fund and paid it over to his wife. The Judges held that the Official Receiver had no claim on that amount. Crump, J., at the close of his judgment, remarking

"even if it be assumed that the learned Judge (who took the view that the Receiver had a claim) has correctly apprehended the law, the point is surrounded with so much doubt that the insolvent may well have entertained a *bona fide* belief that the amount in question was entirely at his disposal."

1. (1904) I L R 29 B 259. 2. (1922) 27 C W N 472.
3. (1919) I L R 46 C 962. 4. (1919) I L R 44 B 673.

The Official Assignee of Madras v. Ranganayaki Ammal.

Daniels, J., in *Devi Prasad* v. *Secretary of State for India in Council* (objector),[5] said of this decision that it was not necessary to go to such a length. In fact no other decision has gone nearly so far. What it decides is that a compulsory deposit remains a compulsory deposit for all time even after it has been repaid and has reached the hands of the depositor. I could understand the Act providing for the depositor taking his deposit free of all debts incurred by him while he was in the company's service. Such a provision is made in sub-section (2) of section 3, where in the case of a deceased depositor, his dependent takes the sum free of all debts contracted either by the depositor or by the dependent before the depositor's death. No such provision is made in sub-section (1), but the Bombay decision, as I understand it, would exempt the deposit from liability for all debts whether contracted before or after it has been drawn out from the fund. As Rankin, J., pointed out in the case already cited, the difference between sub-section (1) and sub-section (2) is that the first does not go as far as the second. In the result I hold that the Official Assignee has a claim on the sums drawn by the insolvent from the fund. To be mentioned again on 26th.

Application No. 765 of 1927.—There will be an order for the wife to pay to the Official Assignee Rs. 3,000, the amount of the fund handed over to her. The payment for the redemption of the jewels is clearly a fraudulent preference. The man was in involved circumstances and preferred his wife to all his other creditors. The payment was clearly voluntary. The Official Assignee will have a charge on the jewels, which must be handed over to him, to the extent of Rs. 600.

N.S. *Application ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Muhammad Abdul Khuddus Sahib and others .. *Petitioners** (*Petrs.*)

v.

Muhammad Ashroof Sahib and others .. *Respondents* (*Counter-Petitioners*).

Abdul Khuddus Sahib v. Ashroof Sahib

Criminal Procedure Code, S. 147—Right to bury dead persons in land—Question to be decided by the Magistrate.

*Cr. R. C. No. 504 of 1927. 30th November, 1927.
Cr. R. P. No. 444 of 1927.

5. (1923) I L R 45 A 557.

Where certain persons claim to have the right to bury their dead in a burial ground, the Magistrate should address himself to the question whether the persons claiming the right exercised that right when occasion arose. The fact that a portion of the ground was ploughed and sown is no ground for holding that it is not a burial ground.

Abdul Khuddus Sahib v. Ashroof Sahib.

Petition under Sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Nidadavole, dated 7th March, 1927, and passed in Miscellaneous Case No. 3 of 1926.

V. Govindarajachari for petitioners.

K. Kameswara Rao for respondents.

The Public Prosecutor for the Crown.

The Court delivered the following

ORDER:—This is an application to revise the order of the Sub-divisional Magistrate of Nidadavole passed under section 145 of the Criminal Procedure Code. The petitioners' contention is that the land in dispute is a burial ground and that they as Muhammadans of Aurangabad are entitled to bury their dead there. The learned Magistrate has only addressed himself to the question of possession and has come to the conclusion that the respondents were in possession and directed that the possession should continue with them. In a case of this kind where certain persons claim to have the right to bury their dead in a burial ground, the Magistrate should have addressed himself to the question whether the persons claiming the right exercised that right when occasion arose. It is only in open spaces in a burial ground that new graves are made. The fact that a portion of the ground was ploughed and sown is no ground for thinking that it is not a burial ground. The petitioners obtained a declaratory decree in O.S. No. 162 of 1916 on the file of the Additional District Munsif's Court of Kovvur with reference to the plot now in dispute. The decision of the District Munsif has not been appealed against. The question is what was the portion which was declared to be the burial ground in that suit. The learned Magistrate has thought fit to place reliance upon the fact that the plot now claimed to be part of the burial ground was ploughed and sown and was also the subject of a lease. This is entirely immaterial for the present purpose. Vacant portions of a burial ground may be improperly used for raising crops; but that would not take away the right of persons entitled to bury their dead when occasion arises. S. 147 which relates to the exercise of any right of use of any land or water covers

Abdul Khuddus Sahib v. Ashroof Sahib.

cases of this description and the Magistrate has to see whether the right which is exercisable only on particular occasions or at a particular season was exercised during the last of such seasons or occasions. It appears there were burials in this plot in spite of objection. The question is not whether the plots in dispute were cultivated or not but whether the Muhammadans exercised their right to bury in any portion of the plot which was decreed to be a burial ground. As the learned Magistrate has not addressed himself to the real question in the case, I set aside his order and direct him to restore the petition to file and dispose of it in the light of the remarks made herein.

N.S. *Petition allowed and case remanded.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Rao Narsingh Rao .. *Appellant** (*Plff.*)

v.

Beti Mahalakshmi Bai and another .. *Respondents* (*Defts.*)

P. C. — Narsingh Rao v. Mahalakshmi Bai

Hindu Law, Mitakshara School—Gift of immoveable property by husband to wife—Stridhan, succession to—Wife's power of alienation over such property—Construction of deed of settlement disinheriting settlor's son and gifting the entire property to settlor's wife, with gift over to grandson on attaining majority—Condition subsequent—Provision in favour of unborn person, inoperative under Hindu Law (since modified by the Hindu Disposition of Property Act, XV of 1916)—When ulterior disposition not valid, prior disposition not thereby affected—Transfer of Property Act, 1882, Ss. 28 and 30.

According to the Mitakshara School of Hindu Law, when a husband makes a gift of immoveable property to his wife, such property is taken by her as stridhan and is descendible to her heirs and not to his, and would devolve first on her daughter and her daughter's daughter and failing them on her daughter's son; but over such property she would have no right of alienation unless the gift was coupled with an express power of alienation or as held by the Judicial Committee in *Ramachandra Rao* v. *Ramachandra Rao,* (1922) I.L.R. 45 M. 320 at 328: 43 M.L.J. 78 (P.C.) unless there are words of sufficient amplitude to confer it upon her.

On the 4th September, 1875, Raja Jaswant Rai, a Hindu governed by the Mitakshara School, executed a deed of gift of his self-acquired property, the material terms of which are set out in the judgment of their Lordships. The settlor's intention clearly was to disinherit his son Balwant Singh, and with a view to effectuate this object, he made a gift of all his property in

---

*P.C. Appeal No. 57 of 1925. 31st January, 1928.

favour of his (the settlor's) wife, Rani Kishori. The deed declared that she was appointed his successor and representative "subject to the following conditions". Under Condition 1 the villages were to be "owned by the Rani just as I owned them" and complete possession was to be given to her. Conditions VI and VII declared (in effect) that if a son was born to Balwant Singh, that son on attaining majority was to take the estate. The plaintiff, a son of Balwant Singh, was born in 1894, and he brought the present suit in 1916 to recover possession of the property from the Rani. He claimed that under the deed of gift he was entitled to succeed to the property on attaining majority and that, even if the provisions of the deed in his favour were illegal and void under Hindu Law (as created in favour of an unborn person), still the Rani took only an estate limited in point of duration which determined when he attained majority, so that (his father Balwant Singh being then dead) he thereupon became entitled to come in as next heir of the settlor Jaswant Rai; in other words, that he was (in any event) entitled to succeed, not under the deed, but as heir of the settlor.

Both the lower Courts (the District Judge and the High Court) found that the provisions of the deed in favour of the plaintiff, who was not then born, were illegal and void under Hindu Law, and this finding was not challenged by the plaintiff before the Privy Council. Indeed, as their Lordships observed, "under a rule of law which has now been altered by the legislature but not retrospectively (*see* the Hindu Disposition of Property Act, XV of 1916), the provisions of the deed in favour of Balwant Singh's unborn son are void and inoperative, and the plaintiff has, therefore, to show that, on the true construction of the deed, there was an intestacy when he attained majority by reason of the failure of the gift over in his favour and that he became entitled to come in as heir of the settlor.'

The sole question, therefore, which their Lordships had to determine was whether, "as contended for the defendants, the Rani took the estate, subject to a condition of defeasance in the event of the plaintiff's attaining majority, and this condition subsequent being void, the Rani was entitled to retain the estate freed from the condition, or whether, as contended for the plaintiff and held by the High Court, the Rani only took a limited estate as custodian of the property until the plaintiff attained majority, when her estate was determined, and the provision in favour of the unborn son being illegal, the estate passed as on intestacy to the heir of the settlor—that is to say, to the plaintiff".

On a proper construction of the deed, their Lordships (differing from the High Court) rejected the plaintiff's contention and dismissed the suit brought by him. "Two intentions appear clearly in the deed, one to exclude Balwant Singh altogether from inheritance, the other to bring in his son on his attaining majority. Both intentions are effectuated under the deed by holding that the Rani and her successors took an estate subject to defeasance on the happening of a certain event, the attainment of majority by a son of Balwant Singh. On the other hand, the construction contended for on behalf of the plaintiff would defeat the settlor's intention by letting in Balwant Singh as the settlor's heir if he was alive, as he very well might have been, when the plaintiff attained majority. For these reasons their Lordships are of opinion that the provisions in the unborn son's favour amount to a condition subsequent, and it is a well-settled principle of law, which has now been

P. C.
Narsingh Rao v. Mahalakshmi Bai.

embodied in Ss. 28 and 30 of the Transfer of Property Act, 1882, that in such a case 'if the ulterior disposition is not valid the prior disposition is not affected by it'............The terms of the deed clearly show that the Rani and her successors were given an estate which was not limited but absolute, in point of duration, and subject only to defeasance in case of Balwant Singh having a son who attained majority. The intention was *wholly* to exclude the heirs of the settlor as such as a means of keeping out his unworthy son (Balwant Singh), and it is not open to the Court to adopt a construction which lets them in."

Judgment of the High Court affirmed upon a different ground.

Appeal No. 57 of 1925 by special leave under an Order in Council, dated the 10th August, 1922, from a judgment and decree, dated the 19th May, 1921, of the High Court, Allahabad (Sir Grimwood Mears, Chief Justice and Sir Pramada Charan Banerji), which affirmed a judgment and decree, dated the 2nd August, 1918, of the Additional District Judge of Aligarh, dismissing the appellant's suit.

The litigation relates to the estate of the late Raja Jaswant Rao, who died in 1879 leaving him surviving his only son Balwant Singh. The latter, having been sentenced in 1871 to 13 years' imprisonment for causing the death of a servant, was disinherited by his father by a deed of settlement, dated the 4th September, 1875, the terms of which are quoted in their Lordships' judgment.

The main questions for determination in the suit were two, namely, (1) whether the appellant was the son of the said Balwant Singh, and (2) whether the appellant was entitled to succeed to the estate of his grandfather Jaswant Rao.

The Additional District Judge decided both questions against the appellant and dismissed his suit. The High Court on appeal (by its judgment and decree, dated the 19th May, 1921) affirmed the finding of the Additional District Judge on the first question and dismissed the appellant's appeal without deciding the second question.

By an Order in Council, dated the 26th July, 1926, the appellant's suit was remanded to the High Court "to reconsider the whole case" on the basis of certain additional evidence as to the birth of the appellant taken in England, under the direction of their Lordships of the Privy Council and to pass judgment thereon, and the Order in Council provided "that the appeal ought to stand over with liberty to either party to restore or amend as they may be advised after the said High Court has passed its judgment as aforesaid".

P. C.

Narsingh Rao v. Mahalakshmi Bai.

After reconsidering the whole case on the further evidence above referred to, the High Court (Sir Grimwood Mears, Chief Justice and Mr. Justice Dalal) delivered judgment on the 11th May, 1927, and recorded their findings in the following words:—

"We find that

(1) Rao Narsingh Rao (the plaintiff) is the son of Rao Balwant Singh and Mussammat Dunaju, his wife.

(2) That Rao Narsingh Rao was born on the 2nd March, 1894.

The legal consequences in our opinion are—

That on the 2nd of March 1912 he became entitled to the following properties:—..........(omitted, as being immaterial).

(3) He is not entitled in our opinion to the properties acquired by Rani Kishori after September, 1875, even if they were acquired by her solely out of the income of the gifted property which was in excess of expenditure".

The finding of the High Court after remand that the appellant (plaintiff) was the legitimate son of Balwant Singh, was not questioned before the Privy Council, and the only question which their Lordships had to decide was as regards the true construction of the deed of settlement, dated the 4th September, 1875.

A reference to the deed will also be found in *Balwant Singh* v. *Rani Kishori*,[1] which was a suit unsuccessfully brought by the plaintiff's father Balwant Singh against Rani Kishori to establish that the donor Raja Jaswant Rai was not competent to dispose of self-acquired immoveable properties.

Upjohn, K. C., Sir George Lowndes, K. C., and *Dube* for appellant.

Sir John Simon, K. C., Maugham, K. C., Kenworthy Brown and *Moti Lal Nehru* for respondents.

31st January, 1928. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—This appeal was filed by the plaintiff Narsingh Rao, son of Balwant Singh and grandson of Raja Jaswant Rai, both deceased, against the first defendant, Rani Kishori, since deceased, the widow of Jaswant Rai, the second defendant, her daughter, Beti Mahalakshmi Bai, and the

1. (1898) 25 I.A. 54; I.L.R. 20 A. 267 (P.C.).

P. C.

Narsingh Rao v. Mahalakshmi Bai.

Sir John Wallis.

third defendant, Mussammat Rameshwar Debi, widow of Lal Raghubans Rao, the second defendant's son, to recover the immoveable properties which were the subject of a conditional deed of gift executed on the 4th September, 1875, by Jaswant Rai in favour of the first defendant, his junior wife. The plaintiff claimed that under the deed of gift he was entitled to succeed to these properties on attaining majority and that, even if the provisions of the deed in his favour were inoperative as opposed to the rules of Hindu Law, still Rani Kishori took only an estate limited in point of duration which determined when he attained majority, so that he thereupon became entitled to take as heir of the settlor Jaswant Rai.

The District Judge found that the plaintiff had failed to prove that he was the legitimate son of Jaswant Rai's only son, Lal Balwant Singh, and that, even if he were legitimate, he was only entitled to take the estate by virtue of a condition subsequent terminating the estate limited to the Rani and her successors in the event of his attaining majority, and that this condition of defeasance, being illegal and void under Hindu Law as created in favour of an unborn person, according to the decision of this Board in *Tagore* v. *Tagore*,[2] was inoperative and void and left the Rani's estate unaffected.

When the case came before the High Court on an appeal by the plaintiff against the decree of the District Judge dismissing the suit, the learned Judges dismissed the appeal on the ground that the plaintiff had failed to prove his legitimacy, and did not go into any other question. In coming to this conclusion, they attached great weight to the fact that the plaintiff's mother had refused to submit herself to a medical examination with reference to the question whether she had ever borne a child. The plaintiff having obtained special leave to appeal from this decree, presented a petition to His Majesty in Council praying that medical evidence on the question should be heard and recorded. His prayer was granted, and two lady gynæcologists, having examined the plaintiff's mother and certified that she had given birth to a child, and both parties having agreed to be bound by this certificate, subject to proof as to the identity of the lady examined, the case was remitted by an Order of His Majesty in Council to the High Court with a direction that in the event of their being satisfied as to the identity of the person so

2. (1872) I.A. Suppl. Vol. 47.

P. C.
Narsingh Rao
v.
Mahalakshmi Bai.
Sir John Wallis.

examined, the High Court should reconsider the whole case on the footing that the certificate was correct and pass judgment thereon, and that the appeal should stand over, with liberty to either party to restore or amend it as they might be advised after the High Court had passed its judgment. After a rehearing on remand the High Court delivered judgment, holding, in the light of the new evidence, that the plaintiff was the legitimate son of the late Balwant Singh, and that, though the provisions in the deed in his favour were void under Hindu Law, as he was not in existence at the date of the deed, still on a true construction of the deed of gift the first defendant's interest was determined on the plaintiff's attaining majority, and that his father Balwant Singh being then dead, he became entitled to come in as next heir of the settlor.

The plaintiff's appeal to His Majesty in Council against the judgment and decree of the High Court has again come on before their Lordships, and in view of the fact that the remand judgment was in favour of the plaintiff-appellant, the case has been argued before their Lordships as if the respondents on the record were appealing from that judgment.

At the outset Sir John Simon, who appeared for the respondents, disclaimed any intention of questioning the finding of the High Court in favour of the plaintiff's legitimacy, which must, therefore, be taken to be established. On the other hand, the finding of both the lower Courts that the provisions of the deed in favour of the plaintiff, who was not then born, were illegal and void, has not been questioned on his behalf. The sole question, therefore, for their Lordships in this appeal is whether, as contended for the defendants, on the true construction of the deed the Rani took the estate, subject to a condition of defeasance in the event of the plaintiff's attaining majority, and this condition subsequent being void, the Rani was entitled to retain the estate freed from the condition, or whether, as contended for the plaintiff and held by the High Court, the Rani only took a limited estate as custodian of the property until the plaintiff attained majority, when her estate was determined, and the provision in favour of the unborn son being illegal, the estate passed as on intestacy to the heir of the settlor—that is to say, to the plaintiff.

It will be convenient in the first instance to set out the following table showing the relationships of the parties in the suit to the settlor, Jaswant Rai:—

P. C.

Narsingh Rao v. Mahalakshmi Bai.

Sir John Wallis.

1. Ratan Kuer = Raja Jaswant Rai (donor) = 2. Rani Kishori
d. 2nd Oct., 1880 | d. 24th August, 1879. | (1st defendant), d. 23rd May, 1921.

Lal Balwant Singh = 1. Naraini Kuer (no issue).
b. 1841,
convicted 2nd Sept., 1871,
released from prison August, 1883,
d. 21st January, 1899.
= (16th June, 1884). 2. Kaithi Wali Lady (no issue and predeceased husband).
= 3. Dunaja, married 1890.
| Narsingh Rao (plaintiff), b. 2nd March 1894.

daughter Mahalakshmi Bai, b. 1868 (2nd defendant and 1st respondent)
| son Lal Raghubans Rao = Rameshwai Debi (3rd defendant and 2nd respondent).
d. without issue, 1911.

In 1875, at the date of the deed, Raja Jaswant Rai, the settlor, had a son by his senior wife, Lal Balwant Singh, aged 34, who was then in prison undergoing a sentence of 13 years' imprisonment for culpable homicide, and a daughter, Mahalakshmi Bai, aged 7, the second defendant, by his junior wife, Rani Kishori, the first defendant.

It appears clearly from the recitals in the deed, which is set out below, that the settlor's intention was to disinherit his unworthy son, Balwant Singh, as regards his self-acquired property. It appears equally clear from the body of the deed that his intention was that, if Balwant had a son, that son on attaining majority should have the estate. This was a very natural wish on the part of a Hindu, and it is what would have happened if effect could be given to the deed according to its terms. Unfortunately, under a rule of law which has now been altered by the legislature but not retrospectively, the provisions of the deed in favour of Balwant's unborn son are void and inoperative, and the plaintiff has therefore to show that, on the true construction of the deed, there was an intestacy when he attained majority by reason of the failure of the gift over in his favour and that he became entitled to come in as heir of the settlor.

It is unnecessary to set out the earlier recitals showing that the property, which was the subject of the gift, was the self-acquired property of the donor, but it may be mentioned that, after his release from prison, Balwant Singh sued to recover the properties included in the deed on the grounds that they were joint family property and that, even if they were not, the donor had no power to dispose of self-acquired immoveable properties. This came before this Board on appeal to His

P. C.
Narsingh Rao v. Mahalakshmi Bai.
Sir John Wallis.

Majesty in Council in *Balwant Singh* v. *Kishori*,[1] when both these contentions were rejected and the decree of the Appellate Court dismissing the suit was affirmed. The rest of the deed was as follows:—

"I am now 63 years old, and weakness and loss of strength are soon coming on, and there is no hope of an issue being born to me, and out of the two sons and a daughter born, Lal Balwant Singh is the eldest, who has, since attaining majority, proved himself unworthy and of bad character; that in spite of the instructions that were conveyed to him to correct his morals, he tried to make himself worse, and openly declared himself to be my enemy, inasmuch as, in consultation with the wishes of the officers for the time being, an agreement was obtained from him to the effect that he would get Rs. 100 per month and improve and correct his morals, but it did no good and he began to commit heinous offences without even fearing the officers for the time being; that at last he had been committed to prison for 13 years on a charge of murder, and he is still in jail; that, looking to these facts, I was compelled to exclude him from right of representing me and from inheritance, under a petition, dated 5th August, 1872, and the younger son's life did not last, having died when only 18 months old. I have now only one daughter, aged seven. I had two Ranis, one the mother of Lal Balwant Singh, who died of the grief brought about by the misconduct and misdeeds of her son, and the other, Rani Kishori, who is still alive. Therefore, for maintaining the name and protecting the property, it is necessary that there should be some representative, and my old age and uncertainty of continuous breathing stand in the way of delay, and besides Rani Kishori, my younger wife, there is no one else entitled to represent me. I have, therefore, made a gift in favour of Rani Kishori, all my moveable and immoveable properties, together with all the rights and interests, both inherent and adventitious, all and in every shape, and appoint her my successor and representative, subject to the following conditions:—

"I. That the zamindari and 'malguzari' in five villages, Lakhna, etc., as lakhiraj in perpetuity, belonging to me, would as well be owned by the Rani Sahib just as I owned it, and all the rights both inherent and adventitious and 'saier' and cesses, etc, appertaining to the zamindari would be in her possession just as I owned it, and complete possession has from this date been delivered to her and petitions would be presented in revenue courts, I would get her name entered in lieu of that of mine.

"II. That the 'jagir' property in seven villages, Biaspur, etc., I make a gift of in favour of the Rani Sahib, but I shall appropriate their income during my lifetime, and would, from time to time, spend that income at my pleasure; but whatever would out of this income be left as surplus after my death and ten per cent. that may for the future be fixed as 'malikana' the Rani Sahib would be entitled to get it, and none would be able to offer obstruction, and the Rani's name would as well be entered in respect of these seven 'jagir' villages.

"III. That I have with great exertion built a temple of Kalka Debiat Lakhna, the Rani Sahib would be the superintendent ('mutwalli') and in

1. (1898) 25 I.A. 54: I.L.R. 20 A. 267 (P.C.).

P. C.

Narsingh Rao v. Mahalakshmi Bai.

Sir John Wallis.

possession of the temple without being interfered with by any one, but the 'charava' (offerings) income of the said temple would be used in the work of the temple, such as the improvement of buildings, etc., according to her wish, just as I have up to date done, and out of the income of the temple, it would never be legal to bring any portion whatever of the income to her personal use.

"IV. I have built a temple known as 'Chatri' in Lakhna in honour of my deceased father, Khuman Singh, and the 'haveli' now occupied by the Rani Sahib appertains to it. That 'Chatri' and 'haveli' are from before under the management and superintendence of Rani Kishori it would as heretofore remain in her possession and management of as 'mutwalli'. Be it known that Thakurain Adhar Kunwar having fixed and assigned the 'malikana' of Dhanna, etc., at Rs 1,249-11-0 for the expenses of 'Chatri', etc., had got mutation effected in favour of the Rani Sahib; but that amount appearing insufficient to meet the expenses relating to 'bhog' (charity), pay of 'Pujaris', peons and other servants of the 'Chatri' and for education of Brahman youths, and the amount of 'malikana' allowance having been decreased in the recent settlement, since then out of the 'jagir' income of Lakhna, etc.—five villages, Rs. 10 per day, I have further allowed for the expenses of 'Chatri', that the Rani Sahib should as usual continue to pay the 'malikana' of Dhanna, etc., and Rs. 10 from the income of five 'jagir' villages, and that money should be spent in the aforesaid work of that 'Chatri' and in preparation of goods and furniture that may add lustre to the 'Chatri'.

"V. Generally the rights of my servants, friends and dependants that are now fixed, they are binding upon the Rani Sahib subject to the conditions and incidents with which they were fixed. As the daughter has not yet been married, the Rani Sahib is bound to prove her generous and charitable spirit in this ceremony and do not give less than Rs. 50,000. Thakurain Adhar Kunwar Sahiba is the head member of my family, and the Rani Sahiba is, by reason of her being young, bound to pay respects due to her old age and attend upon and render service to her. She would continue to pay Rs. 50 per month to the married wife of Lal Balwant Singh.

"VI. That from this date up to 16 years, *i.e.*, when Lal Balwant Singh's age, which is now 34 years, reaches to that of 50, any male issue be born by married wife, he would be entitled to that property on attaining majority, and the Rani Sahib would be bound to retain proprietary possession until he attains majority and deliver the property to him on his attaining majority. If up to this period no male issue be born to Lal Balwant Singh, without waiting for the birth of an issue to him, the Rani Sahib would have the power to appoint owner and representative and heir of the property either Mahalakshmi Bai, daughter, who is now seven years old, or her male issue if one be born to her, subject to this condition that the said daughter and her son take up their permanent residence at Lakhna. If both of these opportunities are not available, the Rani Sahiba is entitled to adopt and appoint him representative and owner of the 'riasat' and property aforesaid, a male issue of Chaudhri Bhup Singh, resident of Mehdipur, who may be considered by the Rani Sahib competent and fit, and in the three cases the Rani Sahib

would be entitled to impose any condition or conditions which she thinks necessary in regard to manner of succession and possession of property.

"VII. If a son be born to Lal Balwant Sight by the married wife after the expiry of the fiftieth year of his age he would even then be entitled to the property after attaining his majority Therefore the said property should remain either in the possession of the Rani Sahib or in that of the daughter, daughter's son or adopted son, whomsoever Rani Sahib might have appointed as representative up to the time that boy of Lal Balwant Singh does not attain the age of 18, and then he would be the owner and hold possession of the property, and from whose possession the son of Lal Balwant Singh obtains the property, he would pay that person Rs. 100 per month.

"VIII. If by chance, before the son of Lal Balwant Singh attains majority, and an issue being born, or before the expiry of 50 years of his age, or in case of no issue being born, the Rani Sahib dies, the said property should devolve on Mahalakshmi Bai or on her son, if alive, and he would remain in possession until a son is born to Lal Balwant Singh by the married wife and attains majority, *i.e.*, he would obtain possession when 18 years old, and the person formerly in possession should get Rs. 100 per month.

"IX. Lal Balwant Singh personally has been excluded from inheritance since August, 1872; he has no power and authority to interfere with the proprietary possession and future powers of the Rani Sahib; but if Lal Balwant Singh after his release adopts an approved and grave course and remains obedient and in the service of Rani Sahib as a son, adopting such a mode of life which Rani Sahib may approve, he would besides Rs. 50 per month allowed to his married wife under para. V of this deed of gift, get Rs. 100 per month from the Rani Sahib for his personal expenses, and this pay is not based on any title, nor would Lal Balwant Singh be able to claim it; nay, its continuance would depend at the pleasure of Rani Sahib.

"X. This deed of gift would, subject to all the terms, be held enforceable from this date; but, subject to the condition that, in case the Rani Sahib dies before me, the entire subject of gift property would revert to me, and the deed of gift, together with all the terms, would be cancelled.

"XI. The Rani Sahib has started a money-lending and 'sarrafi' firm in the name of Sri Gobindji and Rani Kishori at Lakhna with her 'stridhan,' and the deeds relating to debts appertaining to the firm and mortgage deeds and property, which she has contained in her name, I have nothing whatever to do with the business, etc., appertaining to it; they are her special property, and the deed of gift or any of its terms do not at present or for the future affect the same."

After a very careful examination of the able arguments urged before them, their Lordships are of opinion that there are insuperable difficulties in the way of holding that the estate taken by the Rani was limited, as contended for the plaintiff. According to the recitals, the settlor's object was to disinherit his son Balwant, and this purpose was effected by giving the estate to the Rani so that it was no longer descendible to the heirs of the settlor.

P. C.

Narsingh Rao v. Mahalakshmi Bai.

Sir John Wallis.

After reciting that the settlor had been compelled to exclude Balwant Singh from the right of representing him and from inheritance, and that for the purpose of maintaining the name and protecting the property it was necessary that there should be some representative (literally some one to stand in his place), and that there was none but Rani Kishori, the deed goes on, "I have therefore made a gift in favour of Rani Kishori of all my moveable and immoveable properties . . . and appoint her my successor and representative subject to the following conditions." Under condition 1 the villages were to be "owned by the Rani Sahib just as I owned," and complete possession was to be given her. Similarly as to the 10 per cent. on the revenue of seven villages, condition 2 provides that, after the settlor's death, "the Rani Sahib would be entitled to get it and none would be able to offer obstruction".

In their Lordships' opinion there is nothing so far in the deed to cut down the gift or prevent the Rani from taking such an estate in the properties, which are the subject of the gift, as a wife takes in immoveable property given her by her husband. According to the Hindu Law, such property is taken by her as stridhan and is descendible to her heirs and not to his, and would devolve first on her daughter and her daughter's daughter and failing them on her daughter's son, thus effectually excluding Balwant; but over such property, it is stated by Mr. Mayne, paragraph 664, she would have no right of alienation unless the gift was coupled with an express power of alienation, or, as has been held by this Board, unless there are words of sufficient amplitude to confer it upon her. Some reliance has been placed on the fact that there is no mention of the donee's heirs such as is generally found where it is intended to create an estate of inheritance, but Condition VI, which has been so much discussed, shows clearly that it was the settlor's intention to establish a line of succession that would exclude Balwant.

Condition VI provides that if a son is born to Balwant Singh within the next sixteen years—in other words, before he attains the age of fifty—such son is to take the property on his attaining majority, and the Rani is bound to retain "the proprietary possession" until he does attain majority. If, however, no son is born to Balwant before he attains the age of fifty, she is not to be bound to retain the proprietary possession herself, but is expressly empowered to give or bequeath it to her daughter or her daughter's son, *"to appoint owner and representative and*

P. C.

Narsingh Rao v. Mahalakshmi Bai.

Sir John Wallis.

heir" her daughter—the second defendant—or her daughter's son if she have one, and failing them to make an adoption, and in regard to all three cases she is empowered "to impose any condition or conditions which she thinks necessary in regard to manner of succession and possession of property". These provisions, which are only material in so far as they show the intention of the settlor, in their Lordships' opinion, clearly show that it was the intention of the settlor that she should not only have the estate, which under Hindu Law a woman has in property given her by her husband, but should also have power to alienate it to her daughter or her daughter's son, thus enabling her, it may be observed, to prefer the daughter's son to the daughter's daughter, who would be a preferential heir to her stridhan. The effect was, whilst leaving the property to descend as stridhan and so exclude Balwant Singh to enable the Rani to transfer it as she was expected to do, to the daughter's son if there was one, because according to Hindu religious ideas a daughter's son stands in the place of a son and like a son is putrika, or a liberator from put. It was only failing them that she was to have power to adopt, and in all cases she was to have power to impose conditions of succession. These provisions, in their Lordships' opinion, make it clear that it was intended to give her a woman's estate enlarged by the powers of alienation to her daughter and daughter's son, already specified, and that, in default of the exercise of these powers, it was to descend to her heirs.

Condition VII then deals with the birth of a son to Balwant Singh after he had attained the age of fifty, when the widow might have transferred the estate to her daughter and her daughter's son or to an adopted son under condition VI, and provides that she or her transferee should retain the property until Balwant's son attained his majority and hand it over then. Further, it provides that, on succeeding to the property, Balwant's son should be bound to pay Rs. 100 a month to the person from whom he obtained it, an obligation by which the plaintiff would not be bound if it were held that he was entitled to succeed, not under the deed, but as heir of the settlor.

Then comes Condition VIII, which, as translated, is not very clearly worded, but provides for what is to happen in case of the Rani dying before Balwant Singh had attained the age of fifty in case a son had been born to him but had not attained majority, or in case no son had been born to him. In either event the Rani's powers of disposition under condition VI would

P. C.

Narsingh Rao v. Mahalakshmi Bai.

Sir John Wallis.

not have come into operation, and, accordingly, the settlor himself provides that in these events the property is to "devolve on Mahalakshmi Bai or son if alive," who should remain in possession until a son was born to Balwant Singh and attain majority, in which case he would take, and the person on whom the property had devolved would be entitled to receive, Rs. 100 a month.

These provisions for events which have not happened, in their Lordships' opinion, were intended by the settlor to effectuate his declared object of disinheriting his son Balwant and preventing him from claiming to come in as heir on the death of the Rani.

The same intention is clearly expressed in condition IX, which, whilst making some provision for Balwant Singh, recites that he personally had been excluded from the succession and had no power or authority to interfere with the property, possession and future powers of the Rani.

Condition X contains an additional condition of defeasance in the event of the Rani predeceasing the settlor, when the property would revert to the settlor. This clause, which was no doubt intended to enable the settlor to make a fresh settlement, does not appear to throw any light on the present question.

In their Lordships' opinion the testator's intention* clearly was that the property should pass to the Rani and her successors under the deed to the exclusion of the settlor's heirs, unless a son was born to Balwant and attained majority. In that event Balwant's son was to come in and take the estate under the deed, and not as the settlor's heir on the suggested intestacy arising from the failure of the gift over to him, following the determination of the estate limited to the Rani and her successors until Balwant's son should attain majority.

Two intentions appear clearly in the deed, one to exclude Balwant altogether from inheritance, the other to bring in his son on his attaining majority. Both intentions are effectuated under the deed by holding that the Rani and her successors took an estate subject to defeasance on the happening of a certain event, the attainment of majority by a son of Balwant. On the other hand, the construction contended for on behalf of the plaintiff would defeat the settlor's intention by letting in Balwant as the settlor's heir if he was alive, as he very well might have been, when the plaintiff attained majority. For these reasons

* The words "testator's intention" should be read as "settlor's intention". —K.J.R.

P. C.

Narsingh Rao v. Mahalakshmi Bai.

Sir John Wallis.

their Lordships are of opinion that the provisions in the unborn son's favour amount to a condition subsequent, and it is a well-settled principle of law, which has now been embodied in sections 28 and 30 of the Indian Transfer of Property Act, 1882, that in such a case "if the ulterior disposition is not valid the prior disposition is not affected by it."

Their Lordships are therefore unable to agree with the learned Judges of the High Court "that the Rani was left as a custodian of the property until its final devolution to a full owner." The Rani and her successors were put in, not merely as custodians until the attainment of majority of Balwant's son, an event which might never happen, but also to effect the disherison of Balwant himself by leaving the property away from the settlor's natural heirs. In their Lordships' opinion, the terms of the deed clearly show that they were given an estate which was not limited but absolute, in point of duration, and subject only to defeasance in case of Balwant having a son who attained majority or the Rani dying before the settlor. The learned Judges also held that there was a cesser of the Rani's estate "on the attainment of eighteen years by the appellant, and not on the appellant being capable of taking possession of the property", citing *Doe dem Blomfield* v. *Eyre,*[1] a judgment of the Court of Exchequer Chamber. That was the case of a gift to A. B. for life with a gift over which failed, and what was held was that it was clearly not the intention of the settlor that the heirs of the first donee should take in preference to the heirs of the settlor. In the present case the intention was wholly to exclude the heirs of the settlor as such as a means of keeping out his unworthy son, and, in their Lordships' opinion, it is not open to the Court to adopt a construction which lets them in. For these reasons their Lordships are of opinion that the decree of the High Court confirming the decree of the lower Court, and dismissing the suit, was correct, and that this appeal fails and must be dismissed with costs. The costs of the remand to the High Court must also be paid by the appellant. They will humbly advise His Majesty accordingly.

Solicitors for appellant: *Douglas, Grant & Dold.*

Solicitor for respondents: *H. S. L. Polak.*

K.J.R. *Appeal dismissed.*

---

1. (1848) 136 E.R. 1058: 5 C.B. 713.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

Jaigobind Pandey .. *Appellant** (*Deft.*)

v.

Ramnandan Sahai and others .. *Respondents* (*Plffs.*).

P. C.

Jaigobind Pandey v. Ramnandan Sahai.

Ejectment, action of—Plaintiff's title—Onus—Diluviated lands—Adverse possession—Bengal Act VII of 1876 (Land Registration Act)—General Register, entries in, whether conclusive.

In an action of ejectment, when the defendant is admittedly in possession of the land in dispute, the *onus* rests upon the plaintiff to prove title thereto.

In the case of land liable to frequent diluviations by river-action, no question of title by adverse possession or prescription could arise

Quaere: Whether entries in the General Register of revenue-paying estates (maintained under the Land Registration Act, 1876. Bengal Act VII of 1876) are ordinarily to be treated as conclusive as to what passes to the purchaser at a sale for arrears of revenue.

Consolidated Appeals No. 72 of 1925 from a judgment and decree, dated the 12th June, 1923, of the High Court, Patna (Jwala Prasad and Ross, JJ.), which reversed a judgment and decree, dated the 20th September, 1919, of the Subordinate Judge of Saran.

The facts of the case appear sufficiently from the report of the case in the Court below; *see* I.L.R. 2 Pat. 839.

Dube for appellant.

Raikes for respondents.

28th February, 1928. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON:—These are two consolidated cross-appeals from a decree of the High Court of Judicature at Patna, dated the 12th June, 1923, which reversed a decree of the learned Subordinate Judge at Chapra, dated the 20th September, 1919.

The issue between the parties is as to ownership of the lands in a village or mauza called Babhangawan, in the Saran district, except a portion of it which measured 33 bighas and 3 kathas, and which is admitted to belong to and to be in the possession of the plaintiffs.

---

*P.C. Appeal No. 72 of 1925. 28th February, 1928.

P. C.

Jaigobind Pandey v. Ramnandan Sahai.

Sir Lancelot Sanderson.

Proceedings were instituted under the provisions of section 145 of the Code of Criminal Procedure, and the Magistrate decided that the defendant-appellant was in possession of the lands in dispute, and was entitled to remain in possession until ousted by due course of law.

Thereupon the plaintiffs filed the present suit on the 21st of December, 1914.

They alleged that the entire lands of Mauza Babhangawan were within Mahal Raiputti, Tauzi No. 3142, which belonged to them; that they had been dispossessed by the order of the Magistrate; that the defendant had no title thereto, and they claimed a declaration that the entire Mauza Babhangawan was within their Mahal No. 3142, possession and mesne profits.

The first defendant admitted that the plaintiffs were in possession of 33 bighas 3 kathas of the land in Babhangawan, but disputed the plaintiffs' title to any more land therein. The learned Subordinate Judge held that the lands in dispute appertained to the defendant's Mahal Tauzi, No. 3143, and that the plaintiffs had no title thereto.

He accordingly dismissed the plaintiffs' suit with costs, and directed that his finding regarding the 33 bighas 3 kathas should be embodied in the decree. From this decree the plaintiffs appealed to the High Court of Judicature at Patna.

The learned Judges of the High Court allowed the appeal in part, and set aside the decree made by the learned Subordinate Judge. By the High Court's decree, it was declared that the plaintiffs were entitled to one-third of 771 acres 2 roods 37 poles, shown in the revenue survey as Mauza Babhangawan, with the exception of 33 bighas 3 kathas with respect to which the Court had already given the plaintiffs a decree. It was further ordered that the plaintiffs should be awarded possession over the aforesaid area (minus the 33 bighas 3 kathas) with mesne profits to be determined by the lower Court from 1320 until delivery of possession or three years from the date of the decree, whichever is earlier.

It was further ordered that there should be no mesne profits with respect to the 33 bighas 3 kathas which were declared by the Court below to be in the plaintiffs' possession.

Directions as to costs were included in the decree of the High Court.

P. C.

Jaigobind Pandey v. Ramnandan Sahai.

Sir Lancelot Sanderson.

As already stated, both parties have appealed against the High Court's decree.

Jaigobind Pandey, who was the defendant No. 1 in the suit, in his appeal alleged that the plaintiffs' title as constituted by the permanent settlement, was limited to a specific and definite area, *viz.*, the 33 bighas 3 kathas of land hereinbefore referred to, and that, with the exception of the said area, the plaintiffs had not proved a title to any portion of the village of Babhangawan.

His printed case contained allegations as to limitation and adverse possession, but it may be stated at once that it was admitted by the learned counsel for both parties in this appeal that, owing to the nature of the lands, their periodical diluviation by the water of the river and the disputes relating thereto, no question of title by adverse possession or prescription could arise.

The position adopted by the appellant Jaigobind was that he was in possession of the lands in dispute under the Magistrate's order, that the onus was on the plaintiffs to prove title thereto, and that they had failed so to do.

The case of the plaintiffs-appellants shortly stated was that the documentary evidence proved the plaintiffs' title to the whole of the village of Babhangawan; and that in any event the plaintiffs claimed through purchasers at sales held under Act XI of 1859, and were entitled to the whole of Babhangawan, as recorded in the books of the Collector as part of Tauzi No. 3142.

The following statement contained in the judgment of Jwala Prasad, J., shows the various parties to the suit, and traces the title of the plaintiffs to the Mahal Raiputti, Tauzi No. 3142 and of the defendant to the Mahal Raiputti, Tauzi No. 3143:

"The plaintiff No. 1 and the predecessors of the plaintiffs Nos. 2 to 11 purchased at a revenue sale the Ijmali Khata of Mahal named Raipati, Tauzi No. 3142, on the 6th January, 1883. Khata No. 1 of that Tauzi was purchased at a revenue sale by one Balbhadra Sahay on the 10th January, 1901. He sold a part of it on the 21st December, 1901, to plaintiffs 12 to 14 and the remainder on the 2nd February, 1902, to plaintiff No. 15.

"Thus the plaintiffs are now the owners of the entire Mahal Raiputti bearing Tauzi No 3142. The serial number of this Mahal was 82 in the register of 1249. It was subsequently altered to No. 114 and then to No. 2007 (Tauzi) and now it bears Tauzi No. 3142.

"Close to this, there is another Mahal of the same name Raipatti the serial number whereof was 84 in the register of 1249 which was altered to

No. 116 and then to No. 2009 (Tauzi) and now it bears Tauzi No. 3143. This was purchased in 1899 at a revenue sale by defendants 2 to 3 in the Farzi name of their servant Gopal Das from whom they obtained a Ladavi deed (Ex. 49) and then sold it to defendant No. 1 Jaigobind Pandey, brother of defendant No. 6, who is the servant and Gomashta of defendants 2 to 3. Defendants 1 and 6 are members of a joint family and are joint in mess and business. Defendants 4 and 5 are the Thicadars of the said Mahal. The two Mahals Raipatti bearing Tauzi Nos. 3142 and 3143 are situate in Pargana Kasmar, district Saran.

"The dispute in this case concerns a block of land shown and designated as Mauza 'Babhangawan' in the Thak and the revenue survey maps of 1843-44, bearing No. 53, covering an area of 771 acres 2 roods 37 poles defined by boundaries noted therein. Contiguous to the south-east of 'Babhangawan' are the lands shown in the Thak and the revenue maps of 1843-44 in No. 179 under the name of Mauza 'Kedarpura Babhangawan', with an area of 267 acres 1 rood 3 poles."

Their Lordships are of opinion that the appeal presented by the defendant-appellant Jaigobind is without any foundation and must fail. They did not consider it necessary to hear the learned counsel for the plaintiffs in respect of this appeal, and in view of the elaborate and complete judgments delivered by the learned Judges of the High Court, in which the whole of the documentary evidence, on which the appeal depends, was very carefully reviewed, they do not think it necessary to say more than that in view of the aforesaid evidence the contention that the plaintiffs have a title to no more than the said 33 bighas and 3 kathas in the village of Babhangawan is clearly untenable.

The appeal filed by the plaintiffs presents more difficulty.

The first point, upon which the plaintiffs relied in this appeal, is that they claimed through purchasers at sales held under Act XI of 1859, and that consequently they are entitled to the whole of Babhangawan as recorded in the books of the Collector as part of Tauzi No. 3142.

There is no doubt that the predecessors-in-title of the plaintiffs purchased the Mahal Raiputti, Tauzi No. 3142, at sales held under Act XI of 1859. The certificates make that plain.

The sale certificate dated the 29th September, 1883, which referred to the sale of the 6th January, 1883, shows that the Ijmali share in Mahal Raiputti, Tauzi No. 3142, was sold for arrears of Government revenue, that the share was subject to a separate annual Jama of Rs. 1240-7-3, the Sadar Jama of the entire Mahal was stated to be Rs. 2028-8-6¾, and the name

P. C.
Jaigobind Pandey v. Ramnandan Sahai.
Sir Lancelot Sanderson.

of the proprietor was Ghinnu Singh. In this certificate the villages in the Mahal which were sold are not specified.

The sale certificate, dated the 10th September, 1900, which related to a sale of the 9th June, 1900, shows that Balbhadra Sahay was under Act XI of 1859 declared the purchaser of the shares of the property specified in the certificate, and of which a separate account had been opened.

The Mahal was Raiputti and the Tauzi No. 3142.

In this certificate seven villages were named, one of which is "Babhangawan-Kedarpura 8 as."

It was declared that the Sadar Jama of the property sold was Rs. 774-15-9¼ and the Sadar Jama of the entire Mahal was Rs. 2,005-1-5¼.

It appears therefore that the shares mentioned in the two certificates were subject to the payment of the two sums of Rs. 1,240-7-3 and Rs. 774-15-9¼ respectively in respect of Government revenue, and the Sadar Jama of the entire Mahal was stated in one certificate to be Rs. 2,028-8-6¾ and in the other Rs. 2,005-1-5¼.

The question is whether the two sales, to which the above-mentioned certificates relate, included the whole of the village Babhangawan, and if not, what, if any, part of it.

The sale certificate relating to the defendant's Mahal, Tauzi No. 3143, was in respect of a sale of the whole of the estate of Raiputti, Tauzi No. 3143, dated the 6th June, 1899, the Sadar Jama being stated as Rs. 7,236-4-6¼.

Under Act XI of 1859 the Collector had power to sell for arrears of revenue the estates or (in cases in which separate accounts are kept for one or more shares) the shares of estates in respect of which the arrears of revenue are due, and by the Bengal Act XII of 1868, which is to be read with and taken as part of the said Act of 1859 provision is made that in that Act and in Act XI of 1859 the word "estate" means any land or share in land subject to the payment to the Government of an annual sum in respect of which the name of a proprietor is entered on the Register known as the General Register of all revenue-paying estates, or in respect of which a separate account may, in pursuance of section 10 or section 11 of the said Act XI of 1859, have been opened.

It was contended on behalf of the plaintiffs that they are entitled to the estate sold at the above-mentioned revenue sales, *viz.*, the lands which were subject to the payment of the said

P. C.
Jaigobind Pandey
v.
Ramnandan Sahai.
Sir Lancelot Sanderson.

two annual sums of Rs. 1,240-7-3 and Rs. 774-15-9¼, in respect of which the successors of Ghinnu were entered in the General Register of revenue-paying estates, and in respect of which separate accounts had been opened under section 10 of Act XI of 1859, that is to say, to the Mauza Babhangawan with the area of 771 acres 2 roods 37 poles.

It is clear, therefore, that reference must be made in the first instance to the General Register of revenue-paying estates in order to ascertain the estate or share of the estate which the Collector was entitled to sell in respect of the arrears of revenue.

It was agreed by both of the learned counsel who appeared for the parties, that Exhibit 64 (*a*) (printed at pages 386-7 of the record) is a copy of the material entry in the General Register of revenue-paying lands which relates to the Mahal, Tauzi No. 3142, which may be called the plaintiffs' Mahal—and that Exhibit 64 (*d*) (printed at pages 388-90) is a copy of the entry in the said General Register which relates to the defendants' Mahal, *viz.*, Tauzi No. 3143.

These registers are in the form provided by sections 6 and 7 of Bengal Act VII of 1876.

The entry relating to the plaintiffs' Mahal gives the name of the Mahal as Raiputti, the Tauzi No. 3142, and the names and residence of the proprietors. It describes the Mauza as "Babhangawan 5 as. Mauza," and states the Government revenue of the estate to be Rs. 2,028-8-6¾, which in consequence of a deduction in respect of land acquired for the railway is reduced to Rs. 2,005-1-5¼.

The area is not mentioned, but there is an entry of the number "3375" which refers to the entry in the Mauzawar Register, which gives the area of "Babhangawan Kedarpura" as 771 acres 2 roods 37 poles.

The entry in the General Register relating to the defendants' Mahal gives the name of the Mahal as Raiputti, the Tauzi No. 3143, and the names and addresses of the proprietors; the Mauza is described as "Babhangawan Kedarpura 6 as. 1 Mauza."

In this entry the area of the Mauza is stated to be 267 acres 1 rood 15 poles.

The Government revenue of the estate is stated to be Rs. 7,262-10-11, which is reduced on account of land acquired for the railway to Rs. 7,236-4-6½. The reference number to the

P. C
Jaigobind Pandey v. Ramnandan Sahai.
Sir Lancelot Sanderson.

Mauzawar Register is 3376, which describes the area of "Babhangawan Kedarpura" as 267 acres 1 rood 3 poles.

It was argued on behalf of the plaintiffs that the entries in the General Register were conclusive, and that if that be so the plaintiffs' predecessors purchased the whole of the lands in Mauza Babhangawan, and that the predecessors of the defendant purchased Babhangawan Kedarpura, which was a distinct Mauza different from Mauza Babhangawan.

Their Lordships do not think it necessary to express any opinion on the question whether ordinarily the entries in the General Register of revenue-paying estates are to be treated as conclusive as to what passes to the purchaser at a sale for arrears of revenue under Act XI of 1859, and they desire to guard themselves by making it clear that their decision in this case must not be taken as a decision of that question, which is one of much importance.

One sufficient reason for not deciding the above-mentioned question is that in this case the entries in the said General Register on material matters are so ambiguous that if reference is to be made to them alone, it is not possible to say with any certainty what was sold, at the revenue sales, and consequently that in this case the entries in the General Register by themselves cannot be considered to be conclusive on the above-mentioned question.

As, for instance, in the entry relating to the plaintiffs' Mahal, Tauzi No. 3142, the entry under the heading of "Name of Mauza" appear the words "Babhangawan 5 as. Mauza."

The learned counsel, who appeared for the defendant, argued that the entry meant that one-third of the Mauza only was included in the estate, Tauzi No. 3142, which was liable to the revenue of Rs. 2,005-1-5¼. On the other hand, the learned counsel for the plaintiffs urged that the meaning, placed upon this entry by the defendant, was not correct, and that it did not mean a 5 annas share of the Mauza Babhangawan. He suggested that it meant something else, and he referred their Lordships to Ex. T (1) for the purpose of supporting his contention.

It was not clear to their Lordships what exactly the effect of this contention was, except that in the end the learned counsel was constrained to suggest that the said entry in the General Register was a mistake.

P. C.
Jaigobind Pandey v. Ramnandan Sahai.
Sir Lancelot Sanderson.

Again, the area of the village of Babhangawan is not mentioned in the said General Register, and in order to ascertain that area, reference to documents other than the General Register is necessary.

One of these documents is the Mauzawar Register, and it is curious to note that in that register (Ex. 64 (*b*) at page 384 of the record) the Mauza is not described as "Babhangawan" but as "Babhangawan Kedarpur", with an acreage of 771 acres 2 roods 37 poles.

The same name "Babhangawan Kedarpur" is used in Mauzawar Exhibit 64 (*e*) with an area of 267 acres 1 rood 3 poles.

In the General Register relating to the defendants' Mahal, Tauzi No. 3143, the name of the Mauza therein referred to is entered as "Babhangawan Kedarpura 6 as. Mauza," with an area of 267 acres 1 rood 3 poles, and as being included in the estate liable for the revenue of Rs. 7,262-10-11.

In these circumstances their Lordships are of opinion that, whatever may be the general rule, as to which they offer no opinion, in this case the entries in the said General Register are so ambiguous that in order to ascertain their meaning reference to other documents and evidence is necessary, and it is not possible to hold that the entries in the said General Register are in themselves conclusive as to what passed at the above-mentioned revenue sales to the purchasers.

The next point raised by the learned counsel for the plaintiffs was, that if it were permissible to go beyond the entries in the General Register, then the survey maps, the mauzawar and Mahalwari registers, and the Collector's mutation registers were the best evidence of what had been permanently settled, and that the earlier documents produced in the case, when rightly construed, were quite consistent with the above-mentioned maps and the registers.

It was contended that from the year A.D. 1790 the villages Babhangawan and Kedarpura were known as distinct villages but that they were treated as one Mauza for revenue purposes under the name of Babhangawan Kedarpura or Kedarpura Babhangawan, and that one-third of the total area of these villages, namely, 1163 or 1161 bighas was settled with Ghinnu Singh, one of the predecessors-in-title of the plaintiffs, and that the remainder of the total area, *viz.*, about 2324 or 2321 bighas was settled with Parbhu Singh, the predecessor of the defendant.

P. C.

Jaigobind Pandey v. Ramnandan Sahai.

Sir Lancelot Sanderson.

It was further argued that in or about the year 1843 the part of the country, in which the villages were situated, was surveyed and that the survey maps for the first time showed Babhangawan and Kedarpura with defined boundaries and separate areas, that Kedarpura village sometimes had the word Babhangawan before or after it; that the two villages from that time were treated as separate entities for revenue purposes; that there must have been a division by metes and bounds between the predecessors of the plaintiffs and the predecessors of the defendants and that the plaintiffs' predecessors became the owners of the whole of the village of Babhangawan as part and parcel of the Mahal Raiputti, Tauzi No. 3142.

It is not necessary for their Lordships to state in greater detail the contentions of the plaintiffs on this point, for they are fully and clearly set out in the judgments of the High Court.

There is no doubt that the defendant was in possession of the lands in suit, and that the plaintiffs had to prove their title in order to support their claim to the whole of the lands in the village of Babhangawan.

The learned counsel on each side with much care drew their Lordships' attention to the many documents, registers and maps exhibited in the case, and their Lordships are indebted to the learned counsel for the assistance which they rendered not only in that respect, but also by their arguments—presented both in detail and in a summarised form.

The High Court decided that the plaintiffs had not proved their title to the whole of the village of Babhangawan.

The conclusion of the High Court, however, was that Ghinnu Singh, the predecessor of the plaintiffs, had land not exclusively in Babhangawan but in Babhangawan and Kedarpura; that Parbhu Singh, the predecessor of the defendant, had land not exclusively in Kedarpura but in Kedarpura and Babhangawan, and that the shares of Ghinnu Singh and Parbhu Singh in the land of both villages was one-third and two-thirds.

The learned Judges held that as the present litigation was confined to Babhangawan alone, no question arose as to the plaintiffs' right in Kedarpura. Consequently the decree of the High Court was made in the form and to the extent which has been already mentioned, *viz*., that the plaintiffs were entitled to one-third of the area now shown in the revenue survey as Mauza Babhangawan.

P. C.

Jaigobind Pandey v. Ramnandan Sahai.

Sir Lancelot Sanderson.

The question which their Lordships have to consider is whether the plaintiffs have succeeded in showing that the decision of the High Court was wrong.

The evidence has been referred to very fully in the judgments of the learned Judges in the High Court, and their Lordships think it is unnecessary to set it out again in detail. It is sufficient to say that with the assistance of the learned counsel they have considered it fully, and they are of opinion that there was ample evidence to justify the above-mentioned conclusions at which the learned Judges of the High Court arrived, and the decree which was made in accordance therewith.

It was submitted by the learned counsel for the plaintiffs at the end of his argument, that if their Lordships were of opinion that the plaintiffs had not proved their title to the whole of the village of Babhangawan a declaration should be made that the plaintiffs' share was the above-mentioned area of 1163 or 1161 bighas, and that there should be an allocation of that area to the plaintiffs within the boundaries of the Mauza Babhangawan as they are now shown in the revenue survey maps. It is not possible for their Lordships, on the materials which are now before them and at this stage of the proceedings, to accede to this application.

Their Lordships therefore are of opinion that both the appeals should be dismissed, and that in view of this result no order should be made as to the costs of the appeals to this Board.

They will humbly advise His Majesty accordingly.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE MADHAVAN NAIR.

The Commissioner of Income-tax, Madras .. *Referring Officer**

v.

Rao Saheb A. S. Alaganan Chetty of Bodinayakanur .. *Assessee.*

F. B. — Commissioner of Income-tax, Madras *v.* Alaganan Chetty.

Income-tax Act (XI of 1922), S. 10 (2) (ix)—Capital payment—Expenditure not being capital—Payment made for purpose of working contract—Payment made for obtaining contract—Distinction—Test.

The assessees were persons who used to try for and frequently obtain contracts from a tea-growing company for the cartage of their tea down to Kodaikanal Road Station for entrainment. In the assessment year in question, there was a rival contractor who was obviously regarded as likely to be a very dangerous competitor for the contract. In order to induce him not to compete the assessees paid him down a sum of Rs. 12,000.

Held, that the said sum of Rs. 12,000 was paid not for the purpose of working the contract but of obtaining it, that the payment was therefore of a capital nature, and that the assessees were not entitled to a deduction in respect thereof under S. 10 (2) (ix) of the Income-tax Act.

Difference between capital payments and expenditure not being capital.

Case stated under section 66 (2) of Act XI of 1922 by the Commissioner of Income-tax, Madras, in I.T. Appeal No. 765 of 1926-27 on the file of the Assistant Commissioner of Income-tax of Madura on the following questions:—

(1) "Whether the sum of Rs. 12,000 paid in the year of account in the circumstances stated above was expenditure (not being capital expenditure) incurred solely for the purpose of earning the profits and gains of the petitioner's business so as to be allowable as a deduction under section 10 (2) (ix).

(2) Whether the petitioner should be declared not liable to tax on the above amount on the ground that the same amount was treated as income of the payee and was taxed in his hands."

The Commissioner's reference was as follows :—

Under S. 66 (2) of the Income-tax Act (XI of 1922) I have the honour to state the following facts and to request that the opinion of the Hon'ble the Judges of the High Court may be obtained on the questions appended thereto.

---

*Ref. Case No. 12 of 1927. 2nd February, 1928.

F. B.

Commissioner of Income-tax, Madras v. Alaganan Chetty.

2. The petitioner, Rao Saheb A. S. Alaganan Chetty, has been doing business continuously since December 1, 1907 as carting contractor to the Kanan Devan Hills Produce Company, Limited. His relations with the company during this period were defined in a series of contracts, some of which were for one year and some for longer periods. In and before the year beginning 1st December, 1920, there was apparently no competition for the contract. The contract for the year fixes the rate of payment to the contractor at "Rs. 15 per ton gross for produce and goods of whatever kind or description transported from Kodaikanal Road Railway station to Bottom station and *vice versa*." For the year following (1921-22) the rate is shown in the contract as Rs. 14-8-0 per ton gross. For the year 1922-23 the rate is Rs. 14-12-0. This fall in the rates to a figure below Rs. 15 per ton is said to be due to the fact that a competitor, whom I call X, had offered to do the work at the lower rates, and although not successful in obtaining the contract for himself, had nevertheless forced the petitioner to reduce his demand. The next contract was for a period of 3 years beginning from the 1st December, 1923. The rate specified therein is "Rs. 15 per ton gross for transport of all goods of whatever kind or description and bulk from Kodaikanal Road Railway station to Bottom station and Rs. 14-12-0 (Rupees fourteen and annas twelve) per ton gross for transport of all produce and goods of whatever kind and description and bulk from Bottom station to Kodaikanal Road Railway station." These rates are evidently more favourable to the contractor than those of the two previous years and little below those for the year 1920-21.

3. It is asserted, and I do not propose to dispute, that before this contract was given to the petitioner an arrangement was arrived at between him and X under which he agreed to pay a sum of Rs. 12,000 to X on condition that the latter would abstain from competing for the contract.

4. In the year of assessment, 1926-27, the petitioner's accounts were examined with a view to determining the income of the previous year. It was found that the sum of Rs. 12,000 referred to in the previous paragraph had been adjusted in October 1, 1925; to the credit of X. It is admitted that this entry does not represent a pay of cash but for the purposes of this case it is agreed that payment of the whole sum shall be taken to have been made on the date mentioned.

5. In the assessment made upon X in the assessment year 1926-27 this sum of Rs. 12,000 was brought into computation as a sum received by X in the year of account 1925-26.

6. The petitioner claimed that this sum of Rs. 12,000 should be deducted in computing his income as being expenditure allowable

F. B.

Commissioner of Income-tax, Madras v. Alaganan Chetty.

under sub-clause (ix) of clause 2 of S. 10 of the Act. The Income-tax Officer disallowed this claim on the ground that the expenditure "relates to the preliminary process of acquiring the contract and is not expenditure incurred in the year of account during the regular course of business." The Income-tax Officer's decision was upheld on appeal by the Assistant Commissioner.

7. The petitioner now contends that the decision of the Assistant Commissioner is erroneous in point of law. His vakil has agreed to the submission of the following two questions as being those arising out of the order under section 31:—

(i) "Whether the sum of Rs. 12,000 paid in the year of account in the circumstances stated above was expenditure (not being capital expenditure) incurred solely for the purpose of earning the profits and gains of the petitioner's business, so as to be allowable as a deduction under section 10 (2) (ix)".

(ii) "Whether the petitioner should be declared not liable to tax on the above amount on the ground that the same amount was treated as income of the payee and was taxed in his hands".

8. My opinion on the above two questions is as follows:—

(i) The question is briefly whether the expenditure referred to is capital expenditure. The vakil contends that it was not because the money was spent and the petitioner has nothing by way of capital to show for it. In other words, he did not, by means of this payment, acquire an asset. This contention appears to me to overlook the distinction between "capital" and "capital expenditure". The case of the *"Countess Warwick" Steamship Co., Ltd.* v. *Ogg*[1] and the judgment of Lord McLaren in the case of the *Granite Supply Association, Ltd.* v. *Kitton*[2] may be cited as authority for the view that capital expenditure does not necessarily mean expenditure resulting in an increase of capital. It is further asserted that X, the payee, had no power to dispose of the contract, and therefore the payment cannot be said to have been made with the object of securing the contract. It was, however, admittedly made to eliminate competition and thus to enable the petitioner to obtain the contract. I am therefore unable to see that this argument has any force. It is no doubt true that as a result of this payment the petitioner found himself in a position to derive increased profits, but the payment was certainly not part of the actual business operations by means of which these profits were derived. I consider that the payment was of a capital nature and that the question should be answered in the negative.

(ii) The fact that a particular sum was taxed as a "revenue" receipt in the hands of X has no bearing on the question whether the same sum should be treated as "revenue" ex-

1. (1924) 8 Tax Cases 652. 2. (1905) 5 Tax Cases 168 at 171.

F. B.

Commissioner of Income-tax, Madras v. Alagappan Chetty.

penditure in assessing the petitioner. The answer to that question must depend, I consider, on whether the expenditure claimed is covered by statutory provision. My view, therefore, is that the deduction cannot be allowed on the ground on which it is here claimed. I may support this view by citing a remark of Mr. Justice Rowlatt's in the case of *Thomas* v. *Richard Evans & Co., Ltd.*[1]:

"The money that comes in may be . . . capital expenditure of the person who pays it and income of the person who receives it."

M. Patanjali Sastri, Special Counsel for Referring Officer.

Vere Mocket and *L. S. Veeraraghava Aiyar* for respondent (assessee).

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS:—*The Chief Justice.*—The facts in this case are simple and raise a point in a very clean form. The assessees were persons who used to try for and frequently obtain contracts from a large tea-growing company for the cartage of their tea down to Kodaikanal Road station for entrainment. The contracts were made at a flat rate which varied from year to year, so much per ton. In the year we are concerned with there was, and apparently there had been in former years also, a rival contractor who is referred to as Mr. X who was obviously regarded as likely to be a very dangerous competitor for the contract; and in order to induce him not to compete the assessees paid him down a sum of Rs. 12,000. That they say they are entitled to recover as being expenditure not in the nature of capital expenditure incurred solely for the purpose of earning such profits or gains. The result was that as Mr. X did not compete, they had the whole field to themselves, they got the whole contract and were able by screwing up the figures in former years to make more profits than they would have done in those former years. As a matter of fact the probability is that the extra profits they got just about squared with the Rs. 12,000 they paid to Mr. X. The principles that apply are contained in the statute of course and are much illuminated in our opinion by two cases, one in the Court of Appeal and another in the House of Lords in England to which we shall refer and which seem to us to explain in the clearest possible way the distinction between capital payments and expenditure not being capital, where it is conceded that in every case the expenditure is incurred solely for the purpose of earning the profits. I have really

1. 5 Accountant Tax Cases 314.

F. B.

Commissioner of Income-tax, Madras v. Alaganan Chetty.

Coutts Trotter, C. J.

read the material part of the Indian Statute. It is section 10 (2) (ix):

"(2) such profits or gains shall be computed after making the following allowances"

and the only one we are concerned with is sub-section (ix):

"any expenditure (not being in the nature of capital expenditure) incurred solely for the purpose of earning such profits or gains".

The first English case to which I propose to refer is a case of the *City of London Contract Corporation, Limited* v. *Styles*[4] in the Court of Appeal before a very powerful court consisting of Lord Esher, Bowen, L. J. and Fry, L. J. The first passage I am going to read is an observation made by Bowen, L. J. in the course of the argument and it appears to me to be as clear and sharp-cut a distinction as any to be found in the other cases. In that case the assessees took over a business of another company which had a number of unexecuted contracts on hand and the taking-over company paid a lump sum of money to the outgoing company to obtain the benefit of those contracts and claimed it as a deduction. Lord Justice Bowen in the course of the argument said this:

"You do not use it (that is, the money which had bought the contractual rights) 'for the purpose of' your concern (which means 'for the purpose of carrying on your concern') but you use it to acquire the concern".

Similarly Lord Esher at page 244:

"Here is a clear statement that the difference between money expended in the year in order to earn income which was to be received in the year, and the income so received, was £128,000. That is the net profit within the year, that is the sum upon which income-tax is to be paid; and it is as plain as plain can be that you cannot deduct from those net profits so arrived at any part of the capital which you so invested, whether you paid it or not for the purchase of the business which you were obliged to purchase before you could begin the difference between expenditure and income year by year. If you do not darken it with words, it is as plain as plain can be".

Now I pass to a case in the House of Lords, *John Smith & Son* v. *Moore*.[5] The facts I need not really go into because the passage I am going to cite from Lord Sumner is really what directly bears on this case:

"They (the company) said, much as has been said in this case, that before profits can be made out of working a contract, the contract has

4. (1887) 2 Tax Cases 239.
5. (1921) 2 A.C. 13.

F. B.

Commissioner of Income-tax, Madras v. Alagappan Chetty.

Coutts Trotter, C. J.

to be got and the payment of its price is the root of the profits. The Court held that, this sum was paid with the rest of the aggregate price to acquire the business and thereafter profits were made in the business; the sum was not paid as an outlay in a business already acquired, in order to carry it on and to earn a profit out of this expense as an expense of carrying it on. The same is true of the appellants. The whole price paid, in cash or in account, was a sum employed or intended to be employed as capital in the trade of the company, and therefore cannot be deducted in ascertaining profits for income-tax or excess profits duty".

I only wish to refer just in passing to one other case which is the case of the ship-builder and the buying of all the contracts, *"Countess of Warwick" Steamship Company* v. *Ogg.*[1] It is the judgment of a single Judge but it is a judgment of Rowlatt, J., a very great authority in income-tax cases in which he has specialised for so many years. I will not quote his language but the short point was this. The Steamship Company in question had arranged for the purchase of a steamship on the very common system whereby the ship-builders are paid a lump sum in part payment as soon as the keel is laid in the yard and the rest of the price is paid in instalments as the fabric is gradually built up. After about £30,000 had been paid to the ship-builders which was a very small portion of all that would ultimately have to be paid, there was a slump in freights and the owners came to the conclusion that it would be impossible for them to carry on the business of running this ship as a freight-earning ship at any profit whatever and they therefore sought to get out of the liability for paying for a thing that in their hands would be perfectly useless. The £30,000, of course, was gone, but in order to get out of the contract they had to pay another £30,000 and the argument that found favour was that this was not a loss which could be brought into the profit and loss account, because, although it is difficult to say it resulted in any increase of capital or plant in the nature of capital to the ship-owners, it was incurred in relation to that part of their business.

That being the state of affairs, what is the position here? Applying the one which, to my mind, is the easiest to apply, Bowen, L. J.'s test, surely any plain man would say that this money was paid not for the purpose of working the contract but of getting it, it was the price that had to be paid to obtain the contract at all. This appears to us to answer the first question

1. (1924) 8 Tax Cases 652.

F. B.

Commissioner of Income-tax, Madras v. Ayyanan Chetty.

propounded to us and to answer it adversely to the assessee. In that view it is unnecessary to answer the second question. We therefore answer the first question in the negative, confirming the decision of the Income-tax Commissioner, and order the assessee to pay Rs. 250 by way of costs to the Income-tax Commissioner.

Beasley, J.:—I agree.

Madhavan Nair, J.:—I agree.

A.S.V. *First question answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE SRINIVASA AIYANGAR.

Metukur Subba Reddy .. *Appellant** *(2nd Deft.)*

v.

Damavarapu Venkatasubba Reddy and another .. *Respondents (Plffs.)*

Subba Reddy v. Venkatasubba Reddy.

Madras Estates Land Act, Ss. 42 and 147—Scope of—Transfer of holding—Absence of notice to landholder—Application by landholder against transferor for determination of excess rent—Transferee in possession on the date of the application but not made a party—Transferor ex parte *and decree fixing excess rent—Subsequent suit for rent at enhanced rate against transferor and transferee—Transferee if bound by the prior decision fixing excess rent.*

A landholder to whom no notice of the transfer of the holding had been given by the ryot or by his transferee filed an application against the transferor under section 42 of the Madras Estates Land Act for the determination of the excess of rent payable in respect of the holding on the ground of excess in the area. The transferee was as a matter of fact at that time in possession of the holding, but he was not a party to the application. The transferor remained *ex parte* and a decree was passed in favour of the landholder fixing the excess rent payable. The landholder subsequently instituted the present suit for rent at the enhanced rate and impleaded both the transferor and the transferee as defendants. The transferee pleaded that, as he was no party to the prior proceedings for the enhancement of rent, he was not bound by the decree made therein and was entitled to re-open the question of the propriety of the enhancement.

Held, that, by virtue of section 147 of the Madras Estates Land Act, the decision in the previous proceedings for enhancement of rent against the transferor was binding on the transferee so as to disable him from showing that the decision therein was wrong and that, having regard to the actual extent of the land, he was not liable for the increased rent.

Section 147 of the Madras Estates Land Act applies to proceedings under S. 42 and is not confined to proceedings for actual recovery of rent; in

---

*S.A. No. 160 of 1925. 22nd November, 1927.

other words, S. 147 does not restrict the estoppel against the transferee merely to actual suits for rent but applies also in the case of collateral proceedings such as proceedings for the determination of the rent.

Second appeal against the decree of the District Judge, Nellore, in A.S. No. 383 of 1922 preferred against the decree of the Court of the Revenue Divisional Officer of Kavali in Revenue Suit No. 5 of 1920.

M. Patanjali Sastri for appellant.

B. Somayya for respondents.

The Court delivered the following

Wallace, J.

JUDGMENTS:—*Wallace, J.*—Plaintiff is suing the two defendants under section 77 of the Madras Estates Land Act for rent. He claims rent at an enhanced rate following on an order under section 42. All the proceedings under section 42 were against the registered pattadar, the 1st defendant, and he remained *ex parte*. The 2nd defendant was as a matter of fact at that time in possession of the lands by a deed of transfer from the 1st defendant, but he was no party to the proceedings under section 42. It is admitted, however, that neither he nor the 1st defendant had given notice of the transfer to the plaintiff as required by section 146 of the Act. The 2nd defendant contested the suit for rent and claimed that as he was no party to the proceedings for enhancement he is not bound by these, and is entitled now to re-open the question of the propriety of the enhancement. The plaintiff, on the other hand, contends that by force of S. 147 the 2nd defendant is bound by the proceedings which bind his transferor. 2nd defendant rejoins that section 147 has no application to proceedings under section 42, and that is the sole question for consideration here.

2nd defendant's contention is that the wording of the conclusion of section 147 "as if........he had been the defaulter" implies that the section is intended to apply only to cases of transfers in which there are "defaulters" in the sense of persons who have not paid their due rent and that therefore "proceedings" in the section is confined to proceedings for actual recovery of rent and will not therefore apply to proceedings under section 42. I agree with the lower appellate court that the scheme of the Act renders this restricted interpretation untenable. The scope of section 146 obviously is that one who is a ryot of a landholder shall when he has transferred his holding remain subject to the obligations of the ryot *vis a vis* his landlord, unless both he and the transferee have notified the landlord of the transfer; that is,

Subba Reddy v. Venkatasubba Reddy.

Wallace, J.

until the transfer is notified the original owner continues to bear the obligations on the holding. The reason is obvious, *viz.*, to save the landlord from being harassed and bound by all kinds of transfers of which he has not been apprised and to prevent the ryot from evading his obligations by a plea of a transfer to another of which the landlord knows nothing at all. This being the scheme it would be surprising if section 147 restricted the estoppel against the transferee merely to actual suits for rent and not to collateral proceedings also, such as proceedings for determination of the rent. To accede to the 2nd defendant's contention would produce this result that proceedings under section 42 would be open to challenge *ad infinitum* by every one of a succession of transferees, and that one could never say of any proceedings except actual suits for rent that anything had been finally determined by them. To such a result I should not feel myself constrained to come unless the language of the section gives no other alternative. Now where an order has been passed under section 42 against a registered holder enhancing his rent, I do not think it is a straining of language to say that the word 'defaulter' will describe him aptly. He has defaulted in his obligation to his landlord and has come short in his legal duties to him. I would, therefore, hold that section 147 in terms applies.

In any case it seems to me that the proceedings under section 42 to which the registered holder was a party fixed the proper rent at the enhanced rate and, since for any default in paying that rent the land may be sold, it is difficult to see what advantage the appellant will gain by his present contentions. I would, therefore, dismiss this appeal with costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.:—The point for determination in this second appeal lies in a very narrow compass. The facts are these. The holding of a ryot in an estate having been transferred to the present appellant and no notice of the transfer under section 146 of the Act having been given to the landholder, the landholder filed an application against the transferor under section 42 of the Act for the determination of the excess of rent payable in respect of the holding on the ground of excess in the area. The transferor not having defended the action, a decree was passed in favour of the landholder fixing the excess payable. Subsequently, though it is not clear when, notice of the transfer as provided seems to have been given to the landholder and the present suit has been instituted for the recovery of the rent as increased. On the transferee denying his liability to be bound

Subba Reddy v. Venkatasubba Reddy.

Srinivasa Aiyangar, J.

by the decision increasing the rent in a proceeding to which he was not a party, the question has arisen whether, under the terms of section 147 of the Act, the decision in the previous proceeding under section 42 of the Act against the transferor ryot is binding on the transferee so as to disable him from showing that the decision was wrong, and that, having regard to the actual extent of the land, he is not liable for the increased rent. Both the Revenue Officer who tried the application and the District Judge of Nellore on appeal concurred in holding that the 2nd defendant-appellant, the transferee ryot, was bound by the decision in the previous case having reference to the terms of section 147 of the Act.

There can be no doubt that the solution of the question depends entirely on a construction of that section. The matter would also appear to be *res integra* because not only have the vakils on both sides not been able to refer to any previous decisions on the question but they also intimated that they have not been able to find any.

Both the lower Courts having held the 2nd defendant-appellant to be barred by the previous decision, on behalf of the appellant it was argued by Mr. Patanjali Sastri that they were wrong. His argument may be briefly summarised thus. The operative part of section 147 of the Act is to the effect that all acts and proceedings taken against the transferor shall be as valid and effectual as if such acts and proceedings had been commenced or had against the transferee and he had been the defaulter. When the section refers to the transferee as if he had been the defaulter, it follows that the original transferor against whom the act or proceeding was commenced or had must have been a person capable of being accurately referred to as defaulter; or, in other words, the acts and proceedings against the original transferor must have been with reference to the transferor as a defaulter. No doubt having regard to the wording, it must be conceded that there is considerable force in such a contention. But Mr. Patanjali Sastri went on further and argued that a defaulter is a person who has made default in the payment of rent and that therefore the acts and proceedings which will bar the transferee if had against the transferor must have been proceedings against the transferor in his capacity as a defaulter, or, in other words, in his character as a ryot who had made default in the payment of rent.

Subba Reddy v. Venkatasubba Reddy.

Srinivasa Aiyangar, J.

From this the further contention was advanced that an application under section 42 for the purpose of the alteration of the rent in view of the actual extent of the area cannot be properly described as an act or proceeding against a defaulter and therefore section 147 could not possibly be held to apply.

This argument is only calculated to show what has often been pointed out by learned Judges of this Court, that many portions of the Estates Land Act are framed and worded very loosely and unhappily and often very inaccurately. But as the words "and he had been the defaulter" are there in the section, effect should be given to those words in the section and it seems difficult to escape from the argument that if it should be well founded, it would have the effect of narrowing down and limiting considerably the scope of the general words in the first part of the section. It is difficult to understand why the legislature thought it necessary to add these words at all at the end of the section. And in fact the argument of Mr. Patanjali Sastri would seem to indicate that as no other purpose can be regarded as served by these words than that of limiting the section to cases of defaulters as contended for, the contention must be upheld. But it seems to me that having regard to the provision in section 42 that the ryot is liable for the additional rent if there should be excess in the area apart altogether from the procedure prescribed in the proviso in cl. 2 of that section a reference to a ryot who disputes such liability as a defaulter is not so inapt as to lead to the scope of the section being confined by any necessary implication as contended for. A defaulter is a person who has defaulted or committed a default and a default is merely the non-fulfilment of an obligation according to its strict terms. If so, it is difficult to see why a person who fails to pay the additional rent though in occupation of an excess of area should not be properly referred to as a defaulter. Further the person being described as a defaulter only in regard to acts and proceedings against the transferor and therefore by necessary implication by the landholder, it follows that the reference to a person as defaulter would not be to his being a defaulter so adjudicated but only so alleged in the act or proceeding under reference. It must be conceded and indeed it was conceded by Mr. Patanjali Sastri for the appellant that if we hold the expression "defaulter" as not inapt or inaccurate with reference to a transferor ryot in respect of an application by a landholder under section 42, then the contention for the appellant in this

case must fail at any rate so far as the question in this second appeal is concerned.

It is also possible that in adding those words at the end of the section the legislature merely intended to provide against a possible contention that the transferee in certain cases could not be regarded as a defaulter within the meaning of certain sections of the Act.

It is also possible that the true intention of the legislature in adding those words was merely to provide that the transferee shall also be deemed to have been the defaulter in all such cases where a default is necessary before an act or proceeding can be commenced or had.

It seems to us perfectly clear that the lower appellate court was right in assuming that the true policy of the legislature in enacting Chapter IX of the Act and especially section 146 therein was to save the landholders from the necessity at their own risk of going about and finding in the case of every ryot whether or not he had made transfers of the holding before taking any act or proceeding. If such should be recognised to be the general policy of the Act itself it seems to me that construing section 147 in the manner contended for by the appellant merely by reason of the addition of the few words at the end of the section, would be to defeat such clear and declared policy of the Act itself.

One is also unable to understand why if the true intention of the legislature was as argued for the appellant the legislature should not have made the meaning clear in the first part of the section itself by use of apt language without being driven to the necessity of enacting a provision generally and then narrowing its scope and curtailing it considerably by the mere tacking on of a few words at the end.

I am therefore unable to accept the contention on behalf of the appellant and hold that the lower appellate court was wrong in the view taken by it. If section 147 applies also to an application under section 42, then no other question arises and it must be held that the decision of the lower appellate court in granting a decree in favour of the respondents was right. The second appeal must therefore be dismissed with costs.

N.S. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR.

Sammiti Ranga Reddi and others .. *Petitioners**
(*Defts.* 1 *to* 3)

v.

Yallialuru Chinasidda Reddi and another .. *Respondents*
(*Plff. & Deft. No.* 4).

Ranga Reddi *v.* Chinasidda Reddi.

Civil Procedure Code (1908), *Sch. II, para.* 1—*Reference to arbitration—Suit for dissolution of partnership and recovery of the share of the amount due to the plaintiff and his brother the 4th defendant—4th defendant not joining in the reference—Award decreeing the share claimed—Objection—Decree by Court for share of the plaintiff alone, deducting the share of the 4th defendant—Revision—Validity of the reference and subsequent proceedings.*

The plaintiff and his brother the 4th defendant carried on a business in partnership with defendants 1 to 3. The plaintiff and the 4th defendant were entitled to one-twelfth share in the business. The plaintiff instituted a suit for the dissolution of the partnership, settlement of accounts and recovery of the one-twelfth share due to him and his brother the 4th defendant. The 4th defendant also prayed that the amount due to him might be paid to him. The case was, by an order of Court, referred to an arbitration. The 4th defendant did not join in the reference and was not a party to it. The arbitrators gave their award and the plaintiff and the 4th defendant were given their one-twelfth share. This award was objected to on the ground that the reference was invalid as the 4th defendant had not joined in the reference, but the District Munsif held that, if the plaintiff was given half of the one-twelfth share awarded to him and the 4th defendant jointly, the fact that the 4th defendant did not join the reference would not affect the validity of the award, and gave a decree accordingly. A revision petition was filed against this decree

Held that, as the 4th defendant who was a necessary party to the reference did not give his consent and join in the reference, the Court had no jurisdiction to refer the matter to arbitration and the reference itself was invalid, and that this defect which vitiated the reference and all the subsequent proceedings cannot be cured by the Court ignoring the 4th defendant and giving the plaintiff only half of the one-twelfth share due both to the plaintiff and the 4th defendant.

Potita Pavana Panda v. *Narasinga Panda,* (1919) I.L.R. 42 Mad. 632: 36 M.L.J. 538 and *Subba Rao* v. *Appadurai Aiyar,* (1924) 48 M.L.J. 142, followed.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the Court of the District Munsif, Tirupati, in O.S. No. 857 of 1923.

---

*C.R.P. No. 1063 of 1925. 9th December, 1926.

B. Somayya for petitioners.

B. C. Sankaranarayana and *E. Krishnamurthi* for respondents.

The Court delivered the following

JUDGMENT:—The father of the plaintiff and the 4th defendant, the father of defendants Nos. 1 and 2, and another started a partnership business. On the death of the plaintiff's father, his sons became members of the partnership, and the 3rd defendant was also taken in as a partner. Later on, the father of defendants Nos. 1 and 2 having died, they also became members of the partnership. The plaintiff and the 4th defendant were entitled to one-twelfth share in the partnership business. Unpleasantness having arisen between the parties, the plaintiff instituted a suit for the dissolution of the partnership, settlement of accounts, and recovery of his and his brother's one-twelfth share and for other allied reliefs. The defendants including the 4th defendant disputed the correctness of some of the statements made in the plaint. The 4th defendant also prayed that the amount due to him might be paid to him. The case was, by an order of Court, referred to an arbitration of three persons. The 4th defendant did not join in the reference and was not a party to it. One of the arbitrators did not attend three of the meetings of the arbitration board. The arbitrators gave their award and the plaintiff and the 4th defendant were given their one-twelfth share.

Before the District Munsif the award was objected to on the ground that "the reference itself from the Court was invalid for the reason that the 4th defendant had not joined the reference", and also on the ground that all the arbitrators were not present at all their meetings. He overruled the latter objection and, as regards the former, he held that, if the plaintiff was given only half of the one-twelfth share awarded to him and the 4th defendant jointly, the fact that the 4th defendant did not join the reference would not affect the validity of the award. He, therefore, gave a "judgment in the terms of the award as modified with reference to the 4th defendant's share in the amount for the plaintiff's share, *viz.*, Rs. 608-4-10 with subsequent interest". The present petition has been filed by defendants Nos. 1 to 3 to revise the decree of the District Munsif; and the 4th defendant has filed a memorandum of objections effectively supporting the revision petition.

Ranga Reddi v. Chinasidda Reddi.

The same two objections that were pressed before the District Munsif have again been urged before me by Mr. Somayya on behalf of the petitioners. Either of the grounds, if accepted, would lead to the setting aside of the District Munsif's decree. In this judgment I propose to deal only with the first objection, namely, that the award is invalid as the 4th defendant was not a party to the reference.

It cannot be denied that the 4th defendant is a necessary party to the reference. Section 1 of Schedule II of the Civil Procedure Code states that

"Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference."

The section requires that all parties interested should agree before the Court makes a valid reference to arbitration. As the 4th defendant has not joined in the reference, it follows that the reference is not a valid one. What gives the Court jurisdiction to refer matters to arbitration is the consent of all the parties interested, and as the 4th defendant has not given his consent, the Court had no jurisdiction to refer the matter to arbitration. This defect which vitiated the reference and all the subsequent proceedings cannot be cured by the Court ignoring the 4th defendant and giving the plaintiff only half of the one-twelfth share due both to the plaintiff and the 4th defendant. The 4th defendant not being a party to the reference has a right to question the validity of the award and this will affect the interest of defendants Nos. 1 to 3 also. In these circumstances, I hold that the reference itself is invalid. This conclusion is supported by the decisions of this Court in *Potita Pavana Panda* v. *Narasinga Panda*[1] and *Subba Rao* v. *Appadurai Iyer*.[2] It is unnecessary to refer to the other decisions brought to my notice on this point.

In this view, the District Munsif should not have given effect to the award of the arbitrators even in a modified form.

Allowing this objection, I set aside the decree of the lower Court. The District Munsif will restore the suit to his file and proceed to dispose of it on the merits. The 1st respondent will pay the petitioners' costs of this revision petition. The memorandum of objections by the 4th defendant is allowed but I make no order as to costs.

N.S: ——— *Petition allowed.*

1. (1919) I.L.R. 42 M. 632: 36 M.L.J. 538. 2. (1924) 48 M.L.J. 142.

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD SHAW, LORD CARSON AND SIR LANCELOT SANDERSON.

Motilal and another .. *Appellants** (*Plffs.*)

v.

Thakur Ujiar Singh and another .. *Respondents* (*Defts.*).

P. C.

Motilal *v.* Thakur Ujiar Singh.

Civil Procedure Code (1908), *Order* 34, *Rule* 3 (2), *proviso—Power to grant extension of time—'Upon good cause shown'.*

In a suit for foreclosure, where the payment ordered by the preliminary decree is not made within the time fixed, the Court is bound, on being moved in that behalf by the plaintiff, to pass a final decree for foreclosure, *vide* Order 34, Rule 3, Sub-rule (2), Civil Procedure Code, 1908. Under the *proviso* to Sub-rule (2), however, the Court has a discretion upon good cause shown to enlarge the time for payment. But without such 'good cause shown' the Court is not at liberty to grant even a short extension of time *ad miseri cordiam*. The *jurisdiction* to grant an extension rests on good cause shown.

Appeal No. 61 of 1927 from two orders, dated the 25th March and 8th April, 1925, of the Court of the Judicial Commissioner of the Central Provinces (Messrs. Hallifax and Kotwal), which reversed an order and decree, dated the 5th July, 1924, of the Additional District Judge of Bilaspur.

The facts of the case appear sufficiently from the judgment of the Privy Council.

Raikes for appellants.

Dube for respondents.

15th March, 1928. Their Lordships' judgment was delivered by

LORD CARSON:—This action, in which the appellants are the plaintiffs, was brought for foreclosure of a mortgage dated the 6th March, 1914, and executed by the respondents to secure payment of a sum of Rs. 9,305, with interest at the rate of 7 annas per cent. per mensem (the equivalent of 5 5|8 per cent. per annum). Lord Carson.

The due date for repayment under the mortgage was the 15th February, 1923, and on the 21st June, 1923, the sum of Rs. 10,155 being overdue, the appellants brought the present suit claiming foreclosure in default of payment.

*P.C. Appeal No. 61 of 1927. 15th March, 1928.

P. C.
Motilal
v.
Thakur
Ujiar Singh.
Lord Carson.

On the 24th August, 1923, the suit came before the Court of the Additional District Judge of Bilaspur, who by his judgment of that date states that "the defendants (respondents) admit the mortgage deed and entire claim, but they pray for instalments." He held that the defendants had not proved that they were unable to pay and could not get instalments, and decreed full claim and costs and allowed six months for redemption. He further ordered that if such payment was not made on or before the 24th February, 1924, the defendants should be debarred of all right to redeem the property.

No payment was made by the said date, and on the 26th February, 1924, the plaintiffs applied that the decree should be made final, and that the property should be delivered to the plaintiffs. On the 5th July, 1924, the learned District Judge made a decree that the defendants should be debarred of all right to redeem the mortgaged property, and should put the plaintiffs in possession thereof. It appears from the record of the proceedings that on the same day the defendants applied for an extension of time for one year, offering to pay Rs. 3,000 if extension was promised, but the learned Judge refused this application, stating the judgment-debtors' application did not disclose any reason for extension and did not state why payment could not be made earlier, and referred to the fact that the judgment-debtors wanted to pay only if extension was promised. The appellants then applied for execution on the decree on the 26th July, 1924, and on the 16th August, 1924, were put into possession. Meanwhile the defendants, on the 24th July, 1924, appealed to the Court of the Judicial Commissioner of the Central Provinces to set aside the order of the Additional District Judge of the 5th July, 1924, refusing to extend the time and confirming the decree. The appeal was heard before the Appellate Court on the 25th March, 1925, and it is from the order made by the Appellate Court on that occasion that the present appeal is taken to His Majesty in Council.

Before considering the judgment of the Appellate Court, it is necessary to refer to Order 34, Rule 3 (2) of the Code of Civil Procedure (Act V of 1908), under which the order referred to was made by the Court of the Additional District Judge. It is in the following terms:—

"Where such payment is not so made (*i.e.*, the payment ordered by the preliminary decree), the Court shall, on application made in that behalf

P. C.

Motilal
v.
Thakur
Ujiar Singh.

Lord Carson

by the plaintiff, pass a decree that the defendant and all persons claiming through or under him shall be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property."

The order made by the Court of the Additional District Judge, it is to be noted, exactly complies with this Rule. Rule 3 (2), however, goes on to provide that the Court may *upon good cause shown* and upon such terms (if any) as it thinks fit from time to time postpone the day fixed for such payment. From an order under the rule quoted, refusing to extend the time for payment, an appeal lies under Order 43, Rule 1 (*o*) of the same Act.

Now the Appellate Court, in commenting upon the refusal of the lower Court to extend the time for payment, said:

"It is also beyond doubt that when the mortgagors asked for an extension of time they had no intention whatever of paying even at the end of the year for which they asked; they proposed to go on getting extensions in one way or another for as long as possible with a distinct hope that if the payment could be postponed long enough it might be avoided altogether. That certainly cannot be called 'good cause shown' for an extension."

The Appellate Court thereby confirmed the view held by the lower Court, whose jurisdiction to grant an extension as pointed out rested on good cause shown. The Appellate Court, however, added that payment within the normal course is practically unknown, and mortgagors have become accustomed to this. The Court then expressed the view that the lower Court ought to have allowed the mortgagors a very short period in which to pay the whole amount "after explaining to them the misconception under which they and most other mortgagors labour." The Court then proceeded to order that the amount stated in the preliminary decree, with interest up to the 25th March, 1925, and costs, should be paid to the appellants or deposited in Court within 10 days. The respondents, therefore, deposited the sum decreed, and by order of the 8th April, 1925, the Appellate Court ordered this money so deposited to be paid to the plaintiffs, set aside the final decree of the lower Court, and substituted for it a declaration that the mortgage had been redeemed.

It is under these circumstances that the present appeal comes before this Board asking that the two orders of the 25th March and the 8th April, 1925, should be set aside and the final decree of the Additional District Judge of the 26th February, 1924, restored.

P. C.
Motilal
v.
Thakur
Ujlar Singh.
Lord Carson.

Their Lordships cannot agree with the course taken by the Appellate Court. As found by it, there was no "good cause shown" before the lower Court, and without such "good cause shown" it was therefore bound to pass the judgment it did. The Appellate Court do not say that any such "good cause" was shown even before them, and it is difficult to understand, therefore, under what powers they claimed to overrule the lower Court. The only ground they state for the course they have taken is, that the defendants were labouring under misconceptions such as other mortgagors laboured under, and that the lower Court ought to have explained this, and therefore apparently without any good cause shown have granted a short extension of time. Their Lordships point out that so far as appears from the record, no case of misconception of right seems to have been alleged by the defendants nor does any application founded thereon appear to have been put forward before the lower Court, and their Lordships cannot find in the reasons referred to any justification for extending the time for payment. Under the circumstances their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the decrees of the Court of the Judicial Commissioner of the Central Provinces, dated the 25th March, 1925, and the 8th April, 1925, should be set aside, that the decrees of the lower Court of the 24th August, 1923, and the 5th July, 1924, should be restored, and that the respondents should pay the costs of this appeal and of the appeal before the Judicial Commissioner.

Solicitors for appellants: *Barrow, Rogers & Nevill.*

Solicitor for respondents: *H. S. L. Polak.*

K. J. R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD SHAW, LORD CARSON AND LORD ATKIN.

Ruhulla *alias* Hakim Hamad and others .. *Appellants** *(Defts.)*

v.

Hassanalli Degumia .. *Respondent (Plff.)*

P. C.
Ruhulla
v.
Hassanalli
Degumia.

Pardanashin lady—Disposition of property—Onus on party supporting the transaction.

---

*P.C. Appeal No. 115 of 1926. 18th May, 1928.

P. C.
Ruhulla v. Hassanalli Degumia.

In the case of a disposition of property by a pardanashin lady, specially when she is illiterate, a very heavy onus is cast on those supporting her disposition to establish that the transaction was one which the disponent thoroughly comprehended and deliberately and of her own free will carried out.

Held, on the evidence, that in the present case the burden had been satisfactorily discharged. "While it is important to maintain the principles of law laid down for the protection of pardanashin ladies, it is also important not to transmute such a legal protection into a legal disability".

Observations of Lord Shaw in *Kali Bakhsh Singh* v. *Ram Gopal Singh*, (1913) 41 I.A. 23 at 31: I.L.R. 36 All. 81 at 92: 26 M.L.J. 121 (P.C.) relied on.

Judgment of the High Court affirmed.

Appeal No. 115 of 1926 from a judgment and decree, dated the 10th September, 1924 of the High Court of Judicature at Bombay (Sir Lallubhai Shah, Acting Chief Justice and Mr. Justice Kincaid), reversing a judgment and decree, dated the 27th October, 1919 of the Court of the First Class Subordinate Judge of Broach.

The material facts of the case are set out in their Lordships' judgment.

The judgments of Shah, A. C. J. and Kincaid, J., in the Court below are reported in 27 Bom. L.R. 184.

De Gruyther, K. C. and *Parikh* for appellants.

Dunne, K. C. and *Raikes* for respondent.

18th May, 1928. Their Lordships' judgment was delivered by

Lord Atkin.

LORD ATKIN:—The plaintiff in this case claims as mutawali under a deed of wakf by which the settlor, one Asha Begum, a pardanashin lady now deceased, disposed of property of the value of about Rs. 20,000 on the terms that five-ninths of the income should be applied for the benefit of a mosque founded by her grandfather and four-ninths of the income should be applied for the maintenance of the mutawali, who was to be herself during her lifetime and on her decease the plaintiff, who was her maternal uncle. The defendants are the lady's husband and her nearest agnate and some tenants of the property. The suit is for possession. The execution of the deed is not in question. It is, however, undisputed that in the case of a disposition of property by a pardanashin lady an onus is cast on the person relying on the disposition to establish that the transaction is one which the disponent thoroughly comprehended and deliberately and of her own free will carried out.

P. C.

Ruhulla v. Hassanalli Begumia.

Lord Atkin.

After a trial in which the Subordinate Judge decided in favour of the defendants, the High Court, on appeal, ordered a new trial directing an issue in the terms mentioned above. The second Trial Judge who had succeeded the first heard further evidence and found for the defendants, and on appeal his decision was reversed by the High Court, who entered judgment for the plaintiff. As has been said, there is no dispute as to the law, and it may be said that where as in this case the pardanashin lady is illiterate, the Court will be especially alert to see that the burden cast on those supporting her dispositions is satisfactorily discharged. But after a careful consideration of the circumstances disclosed in the evidence in the present case, their Lordships are of opinion that the decision of the High Court should not be disturbed. Asha Begum, at the date of the deed in question, was a lady of between thirty and forty years of age. She had been married some years before to the first defendant (now deceased and represented by his heir), but had only spent one night in his house, and had then returned to her father's house. Her father, Nanumia, in 1912 had given her the property in question, and had subsequently managed it under a power of attorney. He died in 1914. He was on bad terms with his own relations. The plaintiff was Asha Begum's maternal uncle; he appears to have maintained affectionate relations with her, and to have advised her as to her health, which was bad. In 1912, shortly after the deed of gift, the father appears to have prepared a document under which his daughter records that before the gift she and her father had agreed that if she had no children the property should be sold and the proceeds applied to religious uses at Mecca and Medina in equal shares. It appears that in 1917 she was minded to carry out the wishes of her father. Evidence was given by the witness Nagardas, a friend of the family, that he was consulted by the lady, that he advised her that to sell the property might involve a loss, that there would be difficulty in remitting the money to Mecca and Medina, that a mosque at Broach bore her grandfather's name, and that the wakf might properly be made in favour of that mosque. The question of reserving part of the income for her maintenance was discussed, and the lady at that time decided to give nine-sixteenths to the mosque and retain seven-sixteenths for herself. A writer was sent for, a draft prepared, and eventually the document in question was executed and attested and

P. C.

Ruhulla v. Hasanalli Degumia.

Lord Atkin.

duly registered. There is some discrepancy between the witnesses (by no means suspicious in the circumstances of delay between the date of the transaction and the date of the respective trials) as to the precise times which elapsed between the various stages of completion and the varying proposals which ultimately took shape in the deed. But there was abundant evidence that two drafts at last came into existence, that they were read over to the lady, and that she understood them. There was evidence that after the execution of the deed she made an application to be registered as owner in her representative capacity as mutawali and not as heretofore absolutely, and that she took from one of the tenants a renewal as mutawali. The transaction appears to their Lordships, as it did to the High Court, a very natural one for the lady to contemplate. As far as it devoted part of the income to religious uses it carried out her father's wishes. That it reserved a share for maintenance of herself is certainly not a suspicious circumstance. That the plaintiff and members of his family in succession to him should benefit by being appointed mutawali on her death appears in the circumstance to be again a very natural provision. Nor does the defendants' case in this respect appear to be strengthened by the fact that the lady about the same time by will devised the rest of her property to the plaintiff's son. The will appears to be unchallenged. She had no reason to benefit her husband; neither her father nor she appears to have been on friendly terms with her agnatic relations. Moreover, it is intrinsically improbable that any one would attempt to procure the execution of such a document as the deed in question without the settlor's knowledge of its contents. The deed was to take effect at once; one of the witnesses present at its execution, Nijamuddin, was an existing mutawali of the mosque which was to be benefited. The income disposed of to the mosque was about one-fourth of her total income, and it woud be unlikely that she would not speedily become aware of that diminution of her not very considerable income. There is, then, a disposition which the lady had every motive to make, benefiting natural recipients of her bounty, disputed by persons who in the circumstances had no claims upon her, and there is a body of evidence that she knew and approved of what was being done. While it is important to maintain the principles of law laid down for the protection of pardanashin ladies, it is also important as

P. C.
Rahulla
v.
Hassanalli Degumla.
Lord Atkin.

expressed in the judgment of this Board in *Kali Bakhsh Singh* v. *Ram Gopal Singh*,[1] not to "transmute such a legal protection into a legal disability".

The defence raised in the Court below and negatived by the High Court that the deed was executed by the settlor during her death illness was abandoned before the Board. Their Lordships will humbly advise His Majesty that the appeal be dismissed with costs.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *Downer & Johnson.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT:—LORD CARSON, LORD SALVESEN AND SIR LANCELOT SANDERSON.

Nawab Sadiq Ali Khan and others .. *Appellants** (*Defts.*)

v.

Jai Kishori and others .. *Respondents* (*Plffs.*).

P. C.
Nawab Sadiq Ali Khan
v.
Jai Kishori.

Minority—Burden of proof—Mortgage executed by minor, a nullity—Minor not estopped—Muhammadan Law—Age of puberty.

The *onus* to prove minority is on the party who asserts it. "When a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority."

A mortgage deed executed by a minor is a nullity, and incapable of founding a plea of estoppel.

Under the Shiah Law, in the case of females, the age of puberty is nine.†

Appeal No. 59 of 1927 from a judgment and decree, dated the 27th May, 1925 of the Court of the Judicial Commissioner of Oudh (Messrs. Simpson and Misra), which reversed a judgment and decree, dated the 30th April, 1924, of the Subordinate Judge of Lucknow.

The facts of the case appear sufficiently from the report in the Court below; *see* 89 Indian Cases 108.

---

*P.C. Appeal No. 59 of 1927. 22nd March, 1928.

1. (1913) 41 I.A. 23 at 31: 26 M.L.J. 121 (P.C.).

†*See* Tyabji's Muhammadan Law, 1st Edition, page 56.—K.J.R.

P. C.

Nawab Sadiq Ali Khan v. Jai Kishor

Dunne, K. C. and *Rustomji* for appellants.

De Gruyther, K. C. and *Dube* for respondents.

22nd March, 1928. Their Lordships' judgment was delivered by

Lord Salvesen.

LORD SALVESEN:—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, dated the 27th May, 1925, reversing a decree, dated the 30th April, 1924, of the Subordinate Judge of Lucknow.

The first respondent, who alone appeared in the appeal, is the mortgagee under a mortgage, dated the 18th April, 1908, and the appellants are the representatives by succession or purchase of two persons named Baqar Ali Khan and Ali Ahmad Khan.

The mortgage was executed by the two persons last mentioned in security of a sum of Rs. 7,000 loaned by the mortgagee for a term of five years in the first instance and bearing interest at the rate of 14 annas per cent. per mensem. It is in the ordinary form, and provision is made for interest being accumulated at compound rates in the event of non-payment, and for the period of payment of the principal sum and interest being extended beyond the stipulated period in the option of the mortgagee.

The mortgagors were two of the family of a certain Qasim Ali Khan, originally the zemindar of the village of Jamwasi and the owner of certain other heritable properties. Qasim Ali Khan had as far back as the year 1892 executed a deed of gift in favour of his wife, Mussamat Rais-un-nisa, of the entire village of Jamwasi, and on the 10th August, 1899, he executed another deed of gift in her favour of his house property in Lucknow.

On the 21st June, 1902, she in her turn gifted the village Jamwasi and the house property to her three sons and one daughter, excluding, however, from the gift the sir lands in the village, extending to some 27 acres or thereabouts. From that time onwards the four children, who were described as minors in the deed, were registered as the proprietors of the properties in question. They remained in the peaceable occupation of the lands until the present suit was started in 1923, in which the plaintiff (now the first respondent) sought a decree for Rs. 32,632-7-9, and in default of payment, sale of the lands mortgaged in her favour.

P. C.

Nawab Sadiq Ali Khan v. Jai Kishori.

Lord Salvesen.

The case has been decided on the issue whether the two mortgagors were minors at the date when they executed the mortgage in question. On this question of fact the Courts below have differed. The Subordinate Judge held that the executants were minors on that date, but his judgment was reversed by the Court of the Judicial Commissioner. Their judgment is summed up in the following passage:—

"We have given our careful attention to all the evidence which weighed with the Court of trial, but we are not satisfied that the two executants were minors at the time of execution. On the contrary, we think it is quite probable that they were majors. This finding of fact is sufficient to dispose of the appeal, and it becomes unnecessary to consider the questions of law which would arise if we were to find in fact that the executants were minors."

It is noteworthy that the learned Judges did not consider themselves in a position to affirm that the executants of the mortgage were in fact majors at the time of its execution, and it may be inferred from this that the judgment really proceeded on the footing that the appellants had failed to discharge the onus of proof which the Court held rested upon them.

Their Lordships are in agreement with the learned Judges when they say: "Where a deed is executed by a person who alleges himself to be a major at the time of execution, a heavy burden rests upon him or his representatives when they set up the defence of minority." If, therefore, the case depended upon the oral evidence alone, they would not have been disposed to hold that it was so convincing as to entitle the appellants to a finding in their favour. But the documentary evidence which the appellants have adduced and the proceedings instituted in relation to the two mortgagors, Baqar Ali Khan and Ali Ahmad Khan, are so weighty that, if they stood alone and were unchallenged, they would conclusively establish the fact of minority. The first document is a deed of gift dated 21st June, 1902, in favour of her four children by their mother, who is therein described as aged about 28 years, and the four children are described as minors. Taking the age as approximately correct, Rais-un-nisa would be born in or about the year 1874. Following on this deed, Qasim Ali Khan, on the 14th February, 1903, presented an application for guardianship of his minor children. In this application, as required by the Act, he set forth the dates of birth of the four children in question. Baqar Ali Khan is stated to have been born on the 11th February, 1891, and

P. C.

Nawab Sadiq Ali Khan v. Jai Kishori.

Lord Salvesen.

Ali Ahmad Khan on the 19th December, 1892. The ground of the application is that the applicant being the father is the natural guardian of the minors and has no interest adverse to them, and that he had transferred the property mentioned to the minors subject to a prior charge which he wished to pay off by a sale of a portion of the property. It is not strictly correct that the father had transferred the property to the minors directly, for it was transferred by his wife to them; but he had originally been the owner and had made her the gift which she was able to pass on to her children. Their Lordships do not attach any importance to this inaccuracy. The application was granted, and on the 9th November, 1903, a certificate was issued by which Qasim Ali Khan was appointed guardian to the persons and property of his four children during the period of their minority, to wit, until the 11th February, 1912, in the case of Baqar Ali Khan and the 19th December, 1913, in the case of Ali Ahmad Khan.

Qasim Ali Khan seems to have managed the property for several years without requiring to make any application to the District Judge. On the 28th November, 1907, however, in consequence of the marriage of his eldest son, which had already taken place, he applied for the sanction of the Court to pay the expenses incurred to the amount of Rs. 1,580-8-0, and to charge the same against the property of the minor. The age of Baqar is stated to be approximately 16 years according to the certificate of guardianship. His next application, of date the 7th November, 1908, in the suit of guardianship, was one to authorise him to resign the office of guardian. Qasim Ali Khan was permitted to resign, and on the 16th November of the same year Rais-un-nisa, his wife, applied to be appointed guardian in his place. In this application the dates of birth of her children are stated in accordance with the certificate.

An order was made granting the application, and on the 10th December, 1908, the certificate of guardianship was issued in favour of Rais-un-nisa. It will be observed that these last-mentioned proceedings took place after the mortgage had been executed.

In May, 1909, the Court of Wards assumed the charge of the persons and property of the minors under the Court of Wards Act. Notification in the *United Provinces Gazette* was duly made on the 21st May of this fact. The Deputy Commissioner

P. C.
Nawab Sadiq Ali Khan v. Jai Kishori.
Lord Salvesen.

of Bara Banki was put in charge, and although there is no evidence on the subject, it may be assumed that this was done at the instigation of one or both of the parents of the alleged minors. He, in fact, lodged certain objections in a suit which had been brought to charge the sir lands which had been transferred to the minors at the same time that the mortgage in question was executed with a view to protecting these lands in their interests from being charged with a debt of Rais-un-nisa. He failed in his objections on the ground that the alleged purchase by the minors was a simulate transaction and that the property really belonged to the mother, who was the debtor. Incidentally it may be mentioned here that the major part of the sum borrowed from the mortgagee was ostensibly applied in order to meet the purchase price, Rs. 4,000, of the sir lands that then stood in the name of Rais-un-nisa's agent. As these lands were subsequently disposed of by her, the mortgagors derived no benefit from the alleged purchase, and the remainder of the loan was applied in payment of debts due by Qasim.

The position of matters accordingly at the date when the mortgage was granted was that Baqar Ali Khan and Ali Ahmad Khan were still, on the face of the Court records, under the guardianship of their father as minors, the age of majority being 21 according to the law applicable where there has been an appointment of guardian. Baqar Ali Khan, according to the certificate, would then be 17 years of age and his brother 15½. They were accordingly disqualified from acting except through their guardian, and in the mortgage no reference is made to the fact of guardianship. The proceedings which related the registration of the mortgage indicate that it was assumed that the ordinary age of majority, 18, was the only one with regard to which the Registrar had to satisfy himself. Had the certificate of guardianship been brought under his notice, it is reasonably certain that the transaction would not have been completed. The proceedings which were taken after the mortgage itself was granted contained a re-iteration both by the appellants and by the Deputy Commissioner that all the children of Qasim Ali Khan were still in minority.

In their Lordships' view this evidence is sufficient to satisfy the *onus* of proof which rested upon the appellants in the first instance. The first respondent, however, contended that the proceedings of Qasim Ali Khan in getting himself appointed

guardian in 1903 were part of a fraudulent scheme on his part to secure the management of the estates which had been transferred to his children for a longer period than would fall to him as their natural guardian. Her case is that he deliberately underestimated the ages of the children by from five to six years for this purpose, and they have led some evidence to show that the marriage of Qasim Ali Khan and Rais-un-nisa took place as early as 1883 or 1884. This would make the eldest child of the marriage born when the mother was only 9½ or 10 years if the statement of her age in the deed of gift and consistently repeated thereafter was approximately correct.

Their Lordships are unable to discover any motive that Qasim Ali Khan had in 1903 for wilfully misrepresenting the ages of his children. If there was a fraudulent scheme on his part to do so, his wife Rais-un-nisa must also have been a party to it. The properties in question were already protected against Qasim's obligations by being vested in his wife, and the only effect of her transferring the properties to his children was to make it impossible for Qasim to exercise the same control over them as he might have done by influencing his wife. There is not a trace of evidence that Qasim Ali Khan was embarrassed in 1902, and assuming that he acted in good faith in presenting the application for guardianship, he and his wife would probably be the only persons who had knowledge of the dates, whether approximate or otherwise, of the birth of their children. It is not until 1908, when the mortgage was executed, that any fraud can be attributed to Qasim Ali Khan, and even then, if the first respondent's statement is correct that his two sons were both young men of 21 and upwards, the only thing that can be attributed to him was that he had unfairly induced his two elder sons to pledge their share of the properties which they had received originally by gift from him through their mother for payment of his debts. This would not be a fraud upon the mortgagee at all. The most probable explanation of the mortgage being effected was, in their Lordships' opinion, that Qasim Ali Khan thought that by concealing the guardianship proceedings from the mortgagee and passing off his sons as majors of 18 or upwards he could induce the mortgagee to furnish the money which he then required to meet his liabilities without affecting the rights of his minor children in the family estate. That was no doubt a fraud upon the mortgagee, but it affords

P. C.
Nawab Sadiq Ali Khan v. Jai Kishori.
Lord Salvesen.

an intelligible motive for the execution of the mortgage. This theory, however, postulates that his two sons were still below 21 years of age, otherwise his schemes would have failed to have the effect which he no doubt desired of protecting the estate for them while at the same time obtaining the money he urgently required for his own purposes. It cannot reasonably be held to affect the *bona fides* of the statements made in 1903 when the application for guardianship was made.

The only part of the oral evidence which has caused their Lordships some difficulty is that of Muhammad Jafar Husan Khan, who produced the nikahnama of the marriage of his son with the only daughter of Qasim, which took place on the 12th November, 1903. He states that at that time his daughter-in-law was 15 years old and that after 1¼ years she gave birth to a daughter. After an interval of 20 years this evidence cannot be held to be conclusive as to the age of the daughter-in-law or as to the period that elapsed before her first child was born. The Muhammadan age of puberty is nine, and a nikahnama might well be executed some considerable time before the girl went to her husband. Evidence leading to an exactly contrary conclusion is given by Abbas Mirza for the appellants, who impressed the Subordinate Judge favourably. While it is impossible to reconcile the statements of the witnesses, allowance must be made for the lubricity of testimony depending upon recollection extending back for long periods, and such evidence is always far less reliable than contemporaneous statements such as those made by the parents of the parties in this case without, as their Lordships think, any possible motive for misrepresenting the facts.

Their Lordships are the more disposed to reach the same decision as the Judge of first instance because of the delay that has taken place in bringing this suit. For 15 years the mortgagee appears to have made no claim for payment of interest or repayment of the capital sum advanced. No doubt this is not an unusual feature where money is advanced on a mortgage with the ultimate object of the mortgagee acquiring the lands hypothecated by suddenly putting forward a claim of such magnitude that it almost necessarily involves a sale. But the present case is rather special inasmuch as the intervention of the Court of Wards involved a degree of publicity which, if it came to the knowledge of the first respondent's advisers, might well have suggested to

P. C.

Nawab Sadiq Ali Khan v. Jai Kishori.

Lord Salvesen.

them the desirability of postponing any demand. Further, the evidence of the respondent's first witness that he had told the mortgagee's agent at the time of the execution of the mortgage that the mortgagors were in fact minors was allowed to remain uncontradicted, although this agent or the mortgagee herself might have gone into the box. Be this as it may, the long delay has, in fact, deprived the appellants of the direct evidence of three of the principal witnesses on whom they could have relied, *viz.*, the father and mother of the mortgagors and their eldest son, all of whom were dead before the suit was brought, while the other son had ceased to have any interest in the properties hypothecated as he had sold his share for what appears to have been a full price.

On the whole matter, their Lordships are of opinion that the Subordinate Judge came to the right conclusion. The fact of minority being established at the date of the execution by the mortgagors of the deed founded on is sufficient for the decision of the case; such a deed executed by minors being admittedly a nullity according to Indian law, and incapable of founding a plea of estoppel.

They will, therefore, humbly advise His Majesty that the appeal should be sustained, and that the suit should be dismissed with costs here and below since the date of the judgment of the Subordinate Judge.

Solicitors for appellants: *Watkins & Hunter.*

Solicitors for respondents: *James Gray & Son.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the late Chief Court of Lower Burma.]

PRESENT:—VISCOUNT SUMNER, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Maung Ba Pe and another, since deceased (now represented by Maung Aung Thin) *Appellant** (*Deft.*)

v.

Maung Shwe Ba .. *Respondent* (*Plff.*)

P. C.

Maung Ba Pe v. Maung Shwe Ba.

Burmese Buddhist Law—Adoption—Keittima son—Publicity and notoriety—Conduct inimical to adoptive parents.

---

*P.C. Appeal No. 138 of 1924. 22nd May, 1928.

P. C.
Maung Ba Pe
v.
Maung
Shwe Ba.

Where the plaintiff claimed that he was a Keittima son (or son adopted publicly with a view to inherit), the Privy Council in concurring with the learned Judges of the Court of Appeal in Burma that the plaintiff was adopted as a Keittima son with a right to inherit, observed that "according to the law of Burma, no formal ceremony is necessary to constitute adoption. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition; but in that case the publicity or notoriety of the relationship must be satisfactorily proved." In the present case their Lordships came to the conclusion, on the evidence, that the relationship between the plaintiff and his adoptive parents "must have been notorious and publicly known."

Ma Ywet v. *Ma Me,* (1909) 36 I.A. 192. I.L.R. 36 Cal. 978: 19 M.L.J. 577 (P.C.) relied on.

See also *Ma Than Than* v. *Ma Pwa Thit,* (1923) I.L.R. 1 Rang. 451: 45 M.L.J. 334 (P.C.)—K.J.R.

In Burmese Law, an adopted son loses his right to inherit to his adoptive parents on account of conduct unfilial or inimical towards them, as for instance, where he keeps away intentionally from his adoptive parents, or intentionally neglects to look after them during illness, or by failure duly to perform their funeral ceremonies, or is guilty of any other acts which, if proved, according to Buddhist Law, would disentitle a child to inherit.

Held, that in the present case, it was not established on the evidence, that the plaintiff, as adopted son, had been guilty of any unfilial or inimical conduct which would deprive him of his right of inheritance.

See *Maung Sein Thwe* v. *Ma Shwe Yi,* (1920) 10 L.B.R. 396: 64 I.C. 415.—K.J.R.

Appeal No. 138 of 1924 from a judgment and decree, dated the 14th June, 1922 of the late Chief Court of Lower Burma (Robinson, C. J. and Macgregor, J.), which reversed a decree of the District Judge of Pegu, dated the 3rd January, 1920.

The material facts of the case are set out in their Lordships' judgment.

Dunne, K. C. and *Preedy* for appellant.

De Gruyther, K. C. and *Wallach* for respondent.

22nd May, 1928. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON:—This is an appeal by Maung Aung Thin (assignee of Maung Ba Pe and Ma Oh) against the judgment and decree, dated the 14th of June, 1922, of the Chief Court of Lower Burma, which reversed a judgment and decree of the District Court of Pegu, dated the 3rd January, 1920, and which decreed the plaintiff's suit.

The suit was brought by Maung Shwe Ba against Maung Ba Pe, Ma Oh, Ma Cho and Ma Thein Yin.

The plaintiff claimed a declaration that he was the sole heir and legal representative of Ma Ku (deceased) and as such the

P. C.

Maung Ba Pe v. Maung Shw Ba.

Sir Lancelot Sanderson.

absolute owner of all the properties left by the said deceased Ma Ku and other consequential relief.

Maung Ba Pe was alleged to be the late agent of Ma Ku—Ma Oh and Ma Cho were sisters of Ma Ku.

Ma Thein Yin alleged that she was the adopted daughter of Ma Ye Ge, who was the adopted daughter of Ma Ku. The claim of Ma Thein Yin may be disposed of at once. Both the Courts in Burma held that Ma Thein Yin was not adopted by Ma Ye Ge, and in view of these concurrent findings of fact no question has been raised in this appeal with regard to Ma Thein Yin's claim.

It was agreed during the argument that the appellant Maung Aung Thin now represented the interests of the sisters Ma Oh and Ma Cho.

The plaintiff's case was based upon the allegation that he was the Keittima (adopted) son of Ma Ye Ge and her husband Po Kha, that the said Ma Ye Ge was the adopted daughter of Ma Ku, a wealthy Burma Buddhist widow, who died intestate at Thantaga village on the 7th of May, 1918, and that as her grandson by adoption he was her sole heir and legal representative.

The following issues were settled by the learned District Judge:—

(1) Was Ma Ye Ge the adopted daughter of Ma Ku?

(2) Is Maung Shwe Ba adopted son of Ma Ye Ge?

(3) Is Ma Thein Yin adopted daughter of Ma Ye Ge?

(4) Has Maung Shwe Ba lost his right to inherit on account of conduct inimical to Ma Ku?

It was agreed between the parties at the trial that in issue (4) the words "conduct inimical" should be construed as follows:—

"Keeping away intentionally from his adoptive parents": "not intentionally looking after his adoptive parents during illness," and "any other accounts* which, if proved according to Buddhist Law, would disentitle a child to inherit."

It was agreed at the hearing of this appeal that the word "parents" would include Ma Ku, who was alleged to be the plaintiff's grandmother by reason of his adoption by Ma Ye Ge.

*The word "accounts" in the above passage is a clerical error for "acts". —K.J.R.

P. C.

Maung Ba Pe
v.
Maung
Shwe Ba.

Sir Lancelot
Sanderson.

No question arises in this appeal upon the first issue; both the Courts in Burma found that Ma Ye Ge was adopted as a Keittima daughter by Ma Ku, and in this appeal the concurrent findings of fact have not been disputed.

It has already been stated that no question has been raised in this appeal as to the third issue. The material issues, therefore, are the second and the fourth.

Upon the second issue the learned District Judge held that the plaintiff was adopted by Ma Ye Ge as an appatitha (or casually adopted) son. He decided that as the plaintiff had based his claim on the allegation that he was a Keittima son (or son adopted publicly with a view to inherit) the plaintiff was not entitled to succeed on the basis that he was an appatitha son. The plaintiff's suit was dismissed for that and other reasons relating to the fourth issue.

On appeal the learned Judges came to the conclusion that the plaintiff's adoption as a Keittima son by Ma Ye Ge and Po Kha had been clearly established, and that this adoption had been made with the consent and active assistance of Ma Ku and her husband Ko Tet Kha.

There is no doubt that the plaintiff was adopted by Ma Ye Ge and her husband Po Kha in the year 1893 with the consent of the plaintiff's surviving parent. The question is, what was the nature of the adoption?

The following material facts on this part of the case may be mentioned:—

In 1888 Ma Ye Ge was married to Po Kha.

In 1893 the plaintiff was adopted by Ma Ye Ge and her husband. The plaintiff was then 3, 4 or 5 years old, and he went to live with his adoptive parents in the house of Ma Ku at Thantaga.

In 1897 Ma Ku and her husband erected a library at Saingdi. On a tablet in the library, reference was made to the adoptions of Ye Ge and the plaintiff as daughter and grandson.

In 1899 Ma Ku's husband died, and in 1901 the erection of a "Thein" was begun. It was completed in 1905.

In the records of the family set up in the building the plaintiff was mentioned as a grandson.

In 1903 Ye Ge died.

Shortly after her death the plaintiff was initiated into a religious order. The initiation took place at Pegu. Invitations for the ceremony were issued by Ma Ku and Po Kha.

P.C.

Maung Ba Pe
v.
Maung
Shwe Ba.

Sir Lancelot
Sanderson.

In the invitation the plaintiff was referred to as the grandson of Ma Ku and the "beloved son of Po Kha and deceased daughter Ma Ye Ge."

In *Ma Ywet* v. *Ma Me*[1] it was held that, according to the law of Burma, no formal ceremony is necessary to constitute adoption. The fact of adoption may be inferred from a course of conduct inconsistent with any other supposition; but in that case the publicity or notoriety of the relationship must be satisfactorily proved.

The above-mentioned incidents, two of which occurred during the life of Ye Ge, go to show that the relationship between Ye Ge and the plaintiff, as her adopted son, must have been notorious and publicly known.

The learned Judges who heard the appeal in Burma referred in their judgment to other facts material to this issue, the details of which, in their Lordships' opinion, it is not necessary to mention.

It is sufficient to say that their Lordships are of opinion that there was ample evidence to justify the conclusion of the learned Judges, and they agree with their finding that the plaintiff was adopted by Ma Ye Ge and her husband as a Keittima son with a right to inherit.

The following facts are material with regard to the fourth issue:—

In 1909 the plaintiff eloped with Ma Saw Yin. Apparently the plaintiff and his wife returned to Ma Ku's house and lived there, but Ma Saw Yin died after a few months of married life.

In December, 1910, the plaintiff, with the consent of Ma Ku, married Ma Kin Mya.

Ma Ku gave valuable presents on the marriage and the plaintiff and his wife lived with Ma Ku until 1911.

The plaintiff and his wife then went to live in the house of his wife's parents, which was in the same town.

The learned Judges of the Chief Court in Lower Burma held that, for a young man on his marriage to go and live with his parents-in-law was strictly in accordance with the Burmese custom, and that the plaintiff's departure was with the consent and approval of Ma Ku.

1. (1909) 36 I.A. 192: I.L.R. 36 C. 978: 19 M.L.J. 577 (P.C).

P. C.

Maung Ba Pe v. Maung Shwe Ba.

Sir Lancelot Sanderson.

This finding was not seriously contested, and, in their Lordships' opinion, the mere fact that the plaintiff left Ma Ku's house in the circumstances of this case was not conduct which would disentitle him from inheriting.

In 1912 there was a quarrel between Ma Ku and Po Kha. Ma Ku discovered that Po Kha had been transferring some of her lands into his own name and some of the lands into the names of Po Kha and the plaintiff.

Apparently there was a safe, in which documents were kept, in a room of which Po Kha had the key. In his absence Ma Ku collected a certain number of persons, broke into the room in their presence, opened the safe, removed the documents, and took them with her from Ohne, where she had been living, to Thantaga, where she took up her residence with her sister Ma Oh.

There was a complete break in the relations between Ma Ku and Po Kha, and Po Kha instituted criminal proceedings against Ma Ku and others in respect of the breaking into the room and the removal of the documents. The case was dismissed, and it was alleged that the plaintiff was guilty of conduct inimical to Ma Ku in connection with these proceedings.

The learned Judges of the Chief Court stated that there was nothing to show that the plaintiff took any part in the criminal case beyond attending the Court.

It was urged on behalf of the appellant that the learned Judges had made a mistake in this respect, and that it had been proved that in two instances at least the plaintiff had accompanied the process server for the purpose of identifying the person who was to be served with a summons to attend the Court as a witness.

The plaintiff denied having accompanied the process server.

In view of the finding of the Chief Court their Lordships are not prepared to hold that the plaintiff took any part in the criminal proceedings beyond attending the Court, and they agree with the learned Judges that in the circumstances of this case such conduct on his part was not necessarily unfilial or inimical towards Ma Ku.

Subsequently Ma Ku filed a civil suit against Po Kha and Shwe Ba, the plaintiff in the present case.

The plaintiff took no part in these proceedings except that he filed a written statement, which he said was done under his father's instructions. This is more than likely. He was made

P. C.
Maung Ba Po
v.
Maung
Shwe Ba.
Sir Lancelot
Sanderson.

a defendant, and it would be natural for his father to insist on his filing a written statement.

Ma Ku succeeded in the civil proceedings.

Their Lordships' attention was drawn to the pleadings in the civil suit, and the judgments of the Trial Judge and of the Judges who heard the appeal.

Apparently Po Kha sought to establish a title to some of the lands in suit, and reliance was placed upon an alleged pooling arrangement, under which the lands were to be put into the names of Ma Ku, Po Kha and his son Shwe Ba.

The learned Judge who tried the suit stated that he found that one of the matters relied upon by Po Kha raised a difficult question, and that he could find no ruling exactly in point.

He held that Po Kha had made out his claim to items 8 and 9 of Schedule A.

The learned Judges who heard the appeal held that Po Kha had not made out his title to any of the lands as purchaser, and they decided against the alleged pooling arrangement.

Consequently they allowed Ma Ku's appeal and dismissed the appeal of the defendants, with the result that Ma Ku's claim was decreed.

Their Lordships are by no means satisfied that the case put forward by Po Kha was frivolous or vexatious, and they are of opinion that Shwe Ba took no part therein beyond filing the written statement.

The learned Judges of the Chief Court came to the conclusion that Ma Ku entertained no ill-feeling against Shwe Ba, and that she did not wish that he should be dragged into the litigation —but that she was advised that he was an essential party as some of the lands were in his name. Their Lordships see no reason for differing from the conclusion of the Chief Court in this respect.

It was further alleged that the plaintiff had interfered with Ma Ku's tenants and had been working in the interests of his father and against the interests of Ma Ku.

The evidence in respect of this allegation shows that the interference, if any, was at or about the time of the litigation, to which reference has been made, and in which Po Kha was claiming title to or a share in the lands. As already stated, in their Lordships' opinion it has not been established that Po Kha's claim was frivolous or vexatious and without any foundation, and the alleged interference with the tenants, if any, being un-

P. C.

Maung Ba Pe
v.
Maung
Shwe Ba.

Sir Lancelot
Sanderson.

doubtedly in consequence of such claim, must be considered as having been in pursuance of a *bona fide* claim of right made by his father.

Finally, it was argued on behalf of the appellant that the plaintiff had neglected Ma Ku in her old age and illness and had not taken that part in the funeral ceremonies on her death which he should have done.

It has to be remembered that Ma Ku was a wealthy woman, that she was living with relations, and that there is no suggestion that she did not in fact receive proper attention and care from those with whom she was living. She died in the house of her sister. There would be no necessity for the plaintiff to be in constant attendance on Ma Ku, and there is evidence that the plaintiff did visit Ma Ku during her illness, that he went to the house and stayed there for the night before she died, and that he did take a part, not unimportant, in the funeral ceremonies.

On the consideration of the whole evidence their Lordships agree with the conclusion of the learned Judges of the Chief Court that it was not established that the plaintiff had been guilty of any unfilial or inimical conduct which would deprive him of his right of inheritance.

For the above-mentioned reasons their Lordships are of opinion that the appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitors for appellant: *Stoneham & Sons.*

Solicitors for respondents: *Ranken, Ford & Chester.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Athiappa Narayana Reddy .. *Appellant** (*1st Deft.*)

v.

Audilakshmi Ammal (late a minor) declared a major and guardian on record discharged—*Vide* Order dated 20-7-27 on C.M.P. No. 1100 of 1927 and others .. *Respondents* (*Plff., 2nd deft. and party respondent*).

Narayana
Reddy
v.
Audilakshmi Ammal.

Registration Act, Ss 40 and 2 (10)—Will or authority to adopt in favour of a Hindu minor married girl—Presentation for registration of—

*Appeal No. 360 of 1923. 16th January, 1928.

Competency for—Father of minor—Legal guardian of minor—Competency of—Objection to competency of person to present document for registration—Maintainability of, for first time in appeal in suit under section 77 of Registration Act.

Narayana Reddy v. Audilakshmi Ammal.

Held, in view of the terms of Ss. 40 and 2 (10) of the Registration Act, that the father of a Hindu minor married girl was not a guardian competent to present a document for registration on her behalf.

The decision in *Amba* alias *Padmavathi* v. *Srinivasa Kamathi,* (1921) 26 C.W.N. 369 (P.C.) is authority for the proposition that the only kind of guardian who can present a document for registration on behalf of a minor at all is either a guardian according to the personal law of the minor concerned or a guardian legally appointed under the Guardians and Wards Act or otherwise.

Quaere: Whether a will or an authority to adopt can be presented for registration by a guardian at all?

The question as to the competency of a person to present a document for registration being a pure question of law, the objection that the person who in fact presented the document for registration was not competent to do so was allowed to be taken in the appeal in a suit under S. 77 of the Registration Act, though it had not been taken either before the Registering Officers or before the trial Judge.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in O.S. No. 15 of 1922.

M. Patanjali Sastri for appellant.

B. Somayya, K. Krishnamachari and *K. Chakravarthi* for respondents.

The Court delivered the following

JUDGMENTS:—*Kumaraswami Sastri, J.*—This appeal arises out of a suit filed by the respondent (who was the plaintiff acting by her father and next friend) under section 77 of the Registration Act to direct registration of a document purporting to be a will executed by the husband of the minor plaintiff. The Sub-Registrar to whom the document was presented for registration refused to register it on the ground that execution was not proved and his decision was confirmed by the District Registrar on appeal. A suit was filed by the plaintiff by her father as next friend to compel registration. The defendants were the members of the undivided family consisting of themselves and the deceased Guruswami Reddi, husband of the minor plaintiff. The Subordinate Judge was of the opinion that execution of the document was proved and directed registration. Hence this appeal.

Kumaraswami Sastri, J.

The document presented for registration purports to be a will executed by Guruswami Reddi, husband of the minor plaintiff.

Narayana Reddy v. Andilakshmi Ammal.

Kumaraswami Sastri, J.

The minor plaintiff had not attained puberty at the date of the death of her husband and was living under the protection of her father. She had not gone to join her husband's family. The document purports to be a will. It states that the testator while on a pilgrimage got fever, that he was suffering from fever and was growing worse and that he was an undivided member of the joint family which consisted of Venkatasubba Reddi and Narayanappa Reddi. It gives power to his wife to adopt Ramachandra Reddi, the son of his sister and nobody else and says that Ramachandra Reddi should enjoy his share of the moveable and immoveable properties. The document was presented for registration by Bala Reddi, the father of the widow, who, under the will, is directed to make the adoption. No adoption admittedly was made at the date of the death of the deceased or at the time when the document was presented for registration. The only person who could ordinarily present it for registration would be the widow, who was given power to adopt but as she was a minor it was presented by her father Bala Reddi. It is contended in appeal that the presentation by Bala Reddi was not a valid presentation under the Registration Act and that even if the Sub-Registrar registered the document the registration would be invalid and that, therefore, no suit would lie in a Court to direct the Registrar to register the document presented by a person who had no authority to present it. It is also contended in appeal that the Subordinate Judge's judgment was wrong on the merits as the evidence and probabilities point to the conclusion that the will was not executed by the deceased. Mr. Patanjali Sastri has laid stress on various circumstances which he says go to show that the deceased could never have executed the will, but we consider that it is unnecessary to go into the question of the execution of the will as we are of opinion that the other ground, namely that the document was not presented by a person who in law was entitled to present, is sufficient to dispose of the appeal. Section 32 of the Registration Act provides for persons who under the Registration Act are entitled to present a document for registration. Clause (*a*) refers to a person executing or claiming under the document; clause (*b*) refers to the representative or assign of any such person, and clause (*c*) refers to the agent of such person, representative or assign duly authorised by power-of-attorney executed and authenticated in the manner prescribed by the Registration Act. Section 2, cl. 10 defines a representative as including the guardian of a minor

Narayana Reddy v. Audilakshmi Ammal.

Kumaraswami Sastri, J.

and the committee or other legal curator of a lunatic or idiot. Section 40 deals specially with presentation of wills and authorities to adopt. It runs as follows:

(1) "The testator or after his death any person claiming as executor or otherwise under a will may present it to any Registrar or Sub-Registrar for registration. The donor or after his death the donee of any authority to adopt or the adoptive son may present it to any Registrar or Sub-Registrar for registration."

Section 41 provides for the registration of wills and authorities to adopt and the procedure to be followed. Section 40 contains no such provisions as are contained in Section 32, clauses (*a*), (*b*) and (*c*). It is argued for the appellant that so far as section 40 is concerned there being no provisions as are contained in S. 32, clauses (*a*) and (*c*), the only persons who can present a document are, in the case of wills, the executor or the legatees, and in the case of documents giving authority to adopt, the person who executes the document or the person to whom power is given to adopt or the adopted son. It is argued that in the case of minority there is no power in the guardian to present a document for registration. It is contended for the respondents that S.40 which deals with these two classes of documents, namely wills and authorities to adopt, must be read as subject to the general law, that in the case of minors the *de facto* or *de jure* guardian can act for a minor and that the omission of clauses (*a*), (*b*) and (*c*) does not restrict but on the contrary enlarges the scope of persons who are entitled to present a document for registration. Reference has been made to *Venkatappayya* v. *Venkataranga Rao*,[1] where it was held that a document containing authority to adopt presented for registration by the natural father of a minor was validly presented. Sadasiva Aiyar, J., though he thought that it was unnecessary to go into these questions because of the other findings, still referred to some English authorities and thought that the presentation by a natural guardian was sufficient. This decision was given in May 1919. Reference has also been made to an earlier decision of Ayling and Napier, JJ., in Appeal No. 200 of 1908. The document there was a will and it was held that S.40 was wide enough to cover the presentation of a document by the guardian of the minor interested under the will. This decision was given in October, 1912. These decisions no doubt support the contention of Mr. Krishnamachariar, but we think that the matter is con-

1. (1919) I.L.R. 43 M. 288: 38 M.L.J. 149.

Narayana Reddy v. Audilakshmi Ammal: — Kumaraswami Sastri, J.

cluded by the decision of their Lordships of the Privy Council in *Amba* alias *Padmavathi* v. *Srinivasa Kamathi.*[2] This decision was an appeal from a decision of Abdur Rahim and Oldfield, JJ., in Appeal No. 24 of 1916 which is reported in *Padmavathi* v. *Srinivasa Kamathi.*[3] The facts of that case, so far as registration is concerned, are similar to the facts of the present case. There the donor was a member of an undivided family. The property was given to the minor daughter-in-law of the donor and the gift deed was presented for registration by the natural father of the minor. The minor had not joined her husband and she was under the protection of her natural father who would be the *de facto* guardian of the minor. The only difference is that that case would fall under Section 32 of the Registration Act because it was a deed of gift and although S.32 makes provisions for presentation of documents in the case of minors, the question was still raised whether the father of a married minor could be the guardian entitled to present a document under S. 2, clause 10 and S.32 of the Registration Act. Oldfield, J. in that case was of opinion that the presentation by the natural father of the minor was invalid under S.32. The learned Judge observed:

"I should moreover be ready to hold that they were invalid because under S 32 of the Registration Act the documents could be presented only by plaintiff's representative or assign and P.W 7 who presented them was not her assign or her representative under S. 2 (10) since he had ceased to be her natural guardian on her marriage and had not been appointed her legal guardian."

Abdur Rahim, J., did not go into this question as in his view of the facts the document was invalid. Oldfield, J., differed from him on the facts, but they both agreed that, as the document had been revoked before it was presented for registration, the plaintiff-donee got no title. On these facts the case went to the Privy Council, the donee being the appellant. Their Lordships set out the facts in detail and the view of the learned Judges and considered it unnecessary to go into the question as to which there was a difference of opinion as they thought that the document conveyed no title as the registration was invalid owing to the document being presented for registration by the natural father of a married girl who was not her guardian. Their Lordships observed as follows:

"Their Lordships do not think it necessary to pronounce any decision on the question upon which these two learned Judges differed. It was

2. (1921) 26 C.W.N. 369 (P.C.). 3. (1917) 7 L.W. 339.

Narayana Reddy v. Audilakshmi Ammal.

Kumaraswami Sastri, J.

not and is not disputed that these two deeds cannot be given in evidence or enforced if they have not been duly registered. Their Lordships are clearly of opinion that as the appellant was not only a minor but a married woman, her father had ceased to be her natural guardian and was not therefore her assignee or representative within the meaning of section 31 of the Registration Act, 1877. He was not an executant of the said deeds or either of them; neither was he within the meaning of section 34 of that Act, the representative, assign or agent duly authorised on behalf of Krishna Kamathi, the only executant. The presentation by him of the two deeds for registration was in direct conflict with the express provisions of this 34th section. The deeds were consequently never legally registered. The registration of them which was procured was illegal, invalid and a nullity, and if that be so, as in their Lordships' opinion it must be held to be, it is not disputed that the deeds would be void and unenforceable, and this apart altogether from the question whether they have not been impliedly revoked by the agreement, dated the 9th of June 1908, entered into between Krishna Kamathi and the respondent, and duly registered by the former on the 12th of June, 1908. It is therefore unnecessary for their Lordships to expressly decide this latter question. They are of opinion that owing to the invalidity of the registration of the two deeds of May, 1908 the appeal fails and must be dismissed."

This decision in our view applies exactly to the facts of the present case and the fact that the present case falls under S. 40 which makes no provision for presentation by legal representatives makes the case stronger. In order to hold that the document was properly presented for registration, we have got to hold that under section 40 it is open to the guardian of a minor girl to present a document for registration and further hold that a *de facto* guardian who will not come under section 2, clause 10, can present a document for registration when there is a *de jure* guardian in existence. Even if a guardian can do so we are bound by the decision of their Lordships of the Privy Council to hold that the father of a minor married girl is not a guardian competent to present a document for registration on her behalf. There are no facts to distinguish the present case so as to render the decision inapplicable. It has been urged by Mr. Krishnamachariar that it does not appear that the rights of a *de facto* guardian in cases where the interests of the *de jure* guardian were adverse to those of the minor, and he was disputing the document, were pressed before their Lordships, but we cannot say that this aspect of the case was not presented to their Lordships in the course of the argument or was not considered by them as it was obvious from the facts set out by their Lordships. It is no doubt true that for some reason or other the Legislature has omitted to provide for cases where the donee having power

Narayana Reddy v. Audilakshmi Ammal.

Kumaraswami Sastri, J.

to adopt is the minor widow of a member of an undivided family and the legal guardians of the donee, namely, the other coparceners, are interested in denying the authority to adopt. In such cases the only person who can represent the minor effectively would be the father or other relations of the minor who before the marriage would be her legal guardian or would be her legal guardian at the date of presentation if she remained unmarried. Seeing that authorities to adopt unlike wills require registration, the hardship is not imaginary but one of considerable weight, but we think this is a question for the legislature and not for us. We are of opinion that, having regard to the terms of section 40, S. 2, clause 10, and the decision of their Lordships of the Privy Council, the presentation by the father of the minor girl was not a proper presentation by one who was entitled to present the document under the Registration Act. It would be, therefore, useless to direct the Registrar to register the document which if registered would be inoperative and on this ground we think that the plaintiff's suit for registration under S. 77 of the Registration Act should be dismissed.

We may point out that we do not decide any question as regards the factum or validity of the will. The suit is a narrow one under section 77 and the only question that we have to decide is whether the Registrar is bound to register the document if presented. As he is not bound to register a document which is presented by a person not entitled to present it under the Registration Act, a suit under section 77 asking him to register it would not lie. It is no doubt true that this point was not taken before the Sub-Registrar or before the Subordinate Judge, but it is a pure question of law and the fact that it was not taken before the Sub-Registrar or the Subordinate Judge would not enable us to direct an act to be done which will be in contravention of the provisions of the Registration Act, especially when the suit is one under S. 77 of the Act. We are, however, of the opinion that having regard to these facts this is a proper case where each party should bear his costs throughout. We reverse the decree of the Subordinate Judge and dismiss the plaintiff's suit, each party bearing his own costs.

Reilly, J.

Reilly, J.—I agree. The decision of their Lordships of the Privy Council in *Amba* v. *Srinivasa Kamath*[2] appears to me to suggest that it is only by virtue of clause (*b*) of S. 32 of

2. (1921) 26 C.W.N. 369 (P.C.).

Narayana Reddy v. Audilakshmi Ammal — Reilly, J.

the Registration Act that a guardian can present a document for registration on behalf of a minor under that section. That gives some support to Mr. Patanjali Sastri's contention that under S. 40 of the Act which contains no similar clause a will or an authority to adopt cannot be presented by a guardian at all. I prefer not to express a definite opinion upon that question on this occasion; but it appears to me quite clear that the decision of their Lordships in *Amba* v. *Srinivasa Kamathi*[2] is authority for the proposition that the only kind of guardian who can present a document for registration on behalf of a minor at all is either a guardian according to the personal law of the minor concerned or a guardian legally appointed under the Guardians and Wards Act or otherwise. That is sufficient to dispose of the present case, and I agree, therefore, that the plaintiff's suit must be dismissed, though in the circumstances of the case it is appropriate that each party should bear his own costs. This restriction of the persons who can present document for registration on behalf of minors appears to me obviously likely to work great and unnecessary hardship in some cases and I think that is a matter to which the attention of the Legislature might well be drawn.

A.S.V. ——— *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SRINIVASA AIYANGAR AND MR. JUSTICE JACKSON.

Konduru Dasaratharama Reddi and others .. *Appellants** *(Plffs.)*

v.

Indoor Narasa Reddi and others .. *Respondents* *(Defts.)*.

Dasaratharama Reddi v. Narasa Reddi.

Hindu Law—Joint family—Manager—Mortgage in favour of family—Amount due under—Waiver or giving up of—Validity against other members.

The manager of a joint Hindu family cannot waive or give up a sum of about Rs. 1,500 due to the family under a mortgage merely out of charity to or sympathy with the mortgagors who had been reduced in circumstances. Such a waiver or giving up by the manager is not binding on the other members of the joint family.

Second appeal against the decree of the District Court of Nellore in Appeal Suit No. 27 of 1927 preferred against the decree of the Court of the Temporary Subordinate Judge of

*S.A. No. 1872 of 1923. 11th November, 1927.

2. (1921) 26 C.W.N. 369 (P.C.).

Dasaratharama Reddi v. Narasa Reddi.

Nellore in O.S. No. 44 of 1915 (O.S. No. 6 of 1915, District Court, Nellore).

S. Varadachariar and *K. S. Champakesa Aiyangar* for appellants.

T. V. Muthukrishna Aiyar, A. Ramaswami Aiyar, T. N. C. Srinivasa Varadachariar and *M. Venkatasubbiah* for respondents.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—It is to be regretted that having regard to the points that finally emerged and were argued in this second appeal on behalf of the appellants, the only parties interested, namely defendants-respondents 1 and 2, should not have been represented before us and we should have had to hear this second appeal practically *ex parte.* We are, however, obliged to Mr. T. V. Muthukrishna Aiyar, the learned vakil who appeared for the 16th respondent, for his having as *amicus curiae* placed before us the arguments on behalf of those parties.

We have come to the conclusion that the appeal should be allowed and that the dismissal of the plaintiffs' suit being set aside, a decree should be passed in favour of the plaintiffs-appellants with regard to part of their claim.

The plaintiffs' suit was on a mortgage for the sale of the mortgage securities. The facts either as admitted or as finally established are these. The mortgage was jointly in favour of the plaintiffs' family called in these proceedings the Kondur family and the family of the defendants 3 to 16 called the Bezwada family. The family of defendants 1 and 2 were the mortgagors. About July, 1903, the family of defendants 1 and 2 having been reduced in circumstances executed in favour of the Kondur family of the plaintiffs and the Bezwada family certain sale-deeds. The mortgage amount having been advanced by both the mortgagee families and those families being entitled to proportionate shares in the amount under the deed of mortgage, no question arises in this case with regard to the amount due to the Bezwada family, because it is admitted that the amount due to them had been paid off and discharged. We are, therefore, only concerned with the amount due to the Kondur family of the plaintiffs. The finding of both the Courts below was clearly to the effect that the 1st plaintiff did accept the sale-deed, Ex. G-1, in the case in full satisfaction and discharge of the mortgage. Mr. Varadachariar, the learned vakil for the appellants, did not wish to contest that finding. His argument was merely to the effect that the amount due to the plaintiffs' family

at the time was considerably over Rs. 5,000 and that Ex. G-1 was merely a deed of conveyance in favour of the plaintiff's family of property worth Rs. 3,000, that the 1st plaintiff was not in law entitled to grant a discharge to the mortgagors accepting only a portion of the amount due and waiving the balance because though as a waiver it might be binding personally against the 1st plaintiff still as the two other members of the family at that time were minors it was beyond the power of the manager to waive such a large amount without any consideration whatever and that, therefore, the members of the family who were minors at the time were now entitled to seek to recover such balance from the mortgaged properties or such of them as have not been validly disposed of.

It was not argued that the manager of the joint family has no right to settle accounts or in the course of such settlement of account to grant any reductions and accept a smaller amount in full discharge. But it was maintained that it must appear as a *bona fide* settlement of account and not be a case of mere giving up a valid and substantial claim.

It was not also argued that if the 1st plaintiff had merely accepted the sale and conveyance of certain properties without fixing or estimating the value, in full satisfaction and discharge of the mortgage debt, it would still be open to the plaintiffs to question the same apart from any question of fraud. But the contention that was advanced was that in a case where we find that the property of which a conveyance is accepted is agreed and estimated to be of certain value there is no question at all of something being accepted in lieu of entire debt and the position would only be the same as in the case of a payment of an amount equal to the value towards the debt.

The question, therefore, merely resolves itself into whether the manager of a joint family can validly give up a valuable claim of the family and extinguish it without any return or consideration. There can be no doubt that if in such a case a defence should have been put forward and proved such as that the mortgage securities were insufficient to pay the entire mortgage debt, that there were no other properties of the mortgagor and that therefore the acceptance of an absolute conveyance of some of the items of the mortgage security could be regarded as a prudent transaction, there cannot possibly be any question of mere waiver. Nor could there be any such question if in respect of the agreement to waive there had been valuable consi-

Dasaratharama Reddi v. Narasa Reddi.

Srinivasa Aiyangar, J.

deration alleged and proved such as even any agreement on the part of the other creditors similarly to reduce their claims provided, of course, that such reduction by other creditors could be regarded in the circumstances as enuring in some manner for the benefit of the mortgagees. But unfortunately, and we say unfortunately because we cannot help suspecting that having regard to the circumstances it might have been possible to make good some such plea. No attempt has been made in this case to allege or prove any such consideration.

We must, therefore, regard the case as a simple case of the manager of the family waiving or giving up a sum of about Rs. 1,500 due to the family merely out of charity to or sympathy with the mortgagors who had become reduced in circumstances.

From the very statement of the question it would seem to follow that no such waiver or giving up by the manager could be regarded as binding on the minor members of a family and therefore on the family as a whole.

The lower Courts were, therefore, clearly wrong in holding that the act of the 1st plaintiff as manager was binding on the other members of the family who were minors.

The lower appellate Court also came to the conclusion with reference to the sixth issue that the plaintiffs' suit was barred by the law of limitation. The learned District Judge held that there was no acknowledgment of liability in the deed of sale executed in favour of the plaintiffs, Ex. G-1. He was clearly wrong in that conclusion. In that sale-deed the debt due by the mortgagors is clearly referred to and acknowledged and it is towards such debt the sale-deed is alleged to be taken. We must, therefore, hold that apart from other contentions the document contains a sufficient acknowledgment of liability so as to give rise to a fresh starting point for limitation. That was in July, 1903, and the plaint was put into Court within twelve years thereof, namely, in January, 1915. If, therefore, the lower Courts were wrong in dismissing the plaintiffs' action altogether, the next question for consideration is in respect of what properties the plaintiffs are entitled to a decree.

It may be observed that the main object of the plaintiffs' suit appears to have been to obtain a decree in respect of certain properties sold by the family of defendants 1 and 2 to the 5th defendant and sold by him in turn to the 17th defendant and by him again to the 18th and other defendants. These deeds of

Dasaratharama Reddi v. Narasa Reddi.

Srinivasa Aiyangar, J.

sale were impeached by the plaintiffs to be merely *benami* and it is on that basis that the plaintiffs have prayed for a decree against those items of property.

The most curious feature in this case is that the 5th and 7th defendants have admitted that the sales in respect of those items were as alleged by the plaintiffs *benami*. But the 18th defendant has repudiated the allegation and it has been found by the lower Courts that so far as the 18th defendant is concerned the properties obtained on sale by him were not purchased by him *benami* for the family of defendants 1 and 2. That finding has not been questioned before us. It, therefore, follows that even though the plaintiffs may be entitled to a decree for the amount they cannot have such a decree in respect of any of the properties covered by the sale-deed to the 18th defendant or obtained from or through him by any of the other defendants. But what was argued on behalf of the appellants was that having regard to the admitted sales in their favour as *benami* by the 5th and 17th defendants if they are still in possession of any of the properties covered by the suit deed of mortgage, a decree would have to be passed in respect of such items and also against such of the mortgage items as may still be in possession of defendants 1 and 2.

We may observe in this connection that the case on behalf of the real contesting defendant, namely the 18th defendant, was that the plaintiffs' suit was a collusive action for the purpose of recovering for the family of defendants 1 and 2 fraudulently the items in the hands of 18th defendant and the alienees from him. Having regard to the pleadings in this case there appears to be considerable basis for such a contention. But the attack against the 18th defendant having now been abandoned before us by the learned vakil for the appellant it would almost seem that the remedy now asked for in respect of the other properties is one for which the plaintiffs never seriously cared, but it may be that such a remedy is now applied for not for purposes of the actual enforcement of any rights but merely to save the fate of the plaintiffs' case. We have, however, nothing to do with such a consideration. As the plaintiffs want such a decree they would be entitled to one. The appeals must, therefore, be allowed and the decree of the lower Courts dismissing the plaintiffs' action must be reversed and set aside. Instead there will be a decree in favour of the plaintiffs' the usual mortgage decree for the amount claimed in the plaint with further

Dasaratharama Reddi v. Narasa Reddi.

Srinivasa Aiyangar, J.

interest on the principal amount till the date fixed for redemption. Time for redemption six months from the date on which the preliminary decree is finally passed as hereinafter provided. The decree will only be against the items of property included in the deed of mortgage and at present if any, in the hands of defendants 1, 2, 5 and 17 or in the hands of any alienees from defendants 1 or 2 under any alienations not made for the discharge of the suit mortgage. As these items, however, have not been ascertained, the case will have to be remitted to the Court of first instance for ascertaining those items and, on such ascertainment, a preliminary mortgage decree for sale will be passed in favour of the plaintiffs in respect of those items. There will be no personal decree. The plaintiffs-appellants will be entitled to add their costs throughout and recover the same from the properties in respect of which a decree is to be passed. There will be no personal decree in respect of costs. The appellants should pay the respondents in this second appeal, who have appeared, their costs one set.

A.S.V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE JACKSON.

Kutbuddeen Sahib .. *Petitioner** *(Deft.)*

v.

Periyanayaga Padayachi .. *Respondent* *(Pltf.)*.

Kutbuddeen Sahib v. Periyanayaga Padayachi.

Civil Procedure Code (1908), *O. 37—Jurisdiction to act under—Sub-Court which is not a Court of Small Causes but which is merely invested with the jurisdiction of a Small Cause Court under a notification—Sub-Judge of—Jurisdiction of, to act under O. 37, when exercising small cause powers—O 37, R. 1 (d)—Applicability of, to Courts notified under Notification of 23rd October, 1877—Words "having ordinary original civil jurisdiction" in that notification—Meaning of.*

A Subordinate Judge, who is a presiding officer of an ordinary Sub-Court and not of a Court of Small Causes, has not, when exercising small cause powers, authority to act under O. 37 of Civil Procedure Code of 1908.

Section 3 of Civil Procedure Code of 1882 is sufficient to make O. 37, R. (1) (*d*) of Civil Procedure Code of 1908 apply to Courts notified under the notification issued and published in the *Fort St. George Gazette* on 23rd. October, 1877, under the Code of 1877. But that notification does not apply to the Court of a Subordinate Judge when that Subordinate Judge is exercising small cause powers. The words "having ordinary original civil jurisdiction" in that notification were deliberately used to confine the application of the rules to notified Courts when exercising ordinary original civil jurisdiction.

---

*C.R.P. No. 239 of 1927. 5th January, 1928.

Kutbuddeen Sahib v. Periyanayaga Padayachi.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree, dated 25th January, 1927 of the Court of the Subordinate Judge of Negapatam in S.C. No. 817 of 1926.

K. S. Desikan for petitioner.

A. Ramaswami Aiyangar for *N. Doraiswami Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—The short question for decision in this Civil Revision Petition is whether a Subordinate Judge, who is a presiding officer of an ordinary Sub-Court and not of a Court of Small Causes has, when exercising small cause powers, authority to act under O. 37, Civil Procedure Code. O. 37, R. 1 declares that that order shall apply *inter alia* to

"any other Court to which Ss. 532 to 537 of the Code of Civil Procedure of 1882 have been already applied."

Under section 538 of the Code of 1882, sections 532 to 537 of that Code could be applied to

"any other Court having ordinary original civil jurisdiction to which the Local Government may, by notification in the official Gazette, apply them."

As a matter of fact, however, no such notification appears to have been issued under this Act. Under the previous Code, Act X of 1877, sections 532 to 538, which correspond to sections 532 to 538 of the Code of 1882, a notification was issued and published in the *Fort St. George Gazette* on 23rd October, 1877, notifying that the sections applied to Dt. Courts and Courts of Subordinate Judges in the Presidency. Section 3 of the Code of 1882 lays down that any notification published in any enactment thereby repealed shall be deemed to have been published under that Code and that, wherein any notification passed prior to the date when that Code came into force reference is made to Act X of 1877, such reference

"shall, as far as is practicable, be read as applying to this Code or the corresponding part thereof."

We think that is sufficient to make Order 37, Rule 1 (*d*) apply to Courts notified under the notification of 23rd October, 1877.

The question then is, does this notification apply to the Court of a Subordinate Judge when that Subordinate Judge is exercising Small Cause Court powers? The notification by force of section 538 of the Code of 1877 only applies to

"any other Court having ordinary original civil jurisdiction."

Kutbuddeen Sahib v. Periyanayaga Padayachi.

This in itself would seem to restrict the application of the notification to the ordinary original civil jurisdiction of the Court, as the petitioner contends. It is argued, however, for the respondent first that the word 'having' merely purports 'possessing' and not 'when exercising' and secondly that the words 'ordinary original' describe the jurisdiction not as distinct from Small Cause Jurisdiction but as distinct from appellate, maritime or other jurisdictions which a Civil Court may possess. Neither of these contentions appears to us convincing. As to the first, there seems to us no point in describing a Court as a Court having Original Civil Jurisdiction unless it was meant that it was such Court and no other to which the notification should apply. It does not follow automatically that every Court having Original Civil Jurisdiction has also Small Cause Jurisdiction. The phrase, therefore, could not have been intended automatically to include also Courts having Small Cause Jurisdiction. As to the second contention there seems to us no point in using the words "Original Civil Jurisdiction" in order to distinguish Courts to which the notification should apply from appellate, maritime and other Courts, since the procedure prescribed by Ss. 532 to 537 could never be applied to such Courts at all. The procedure could only apply to Courts in which suits on bills of exchange, etc., could be brought. It, therefore, appears to us that the words "having ordinary civil jurisdiction" were deliberately used to confine the application of the rules to notified Courts when exercising Ordinary Original Civil Jurisdiction.

Now the Court against whose decision this Civil Revision Petition is preferred is not a Court of Small Causes but a Court invested with the jurisdiction of a Small Cause Court under a notification of this Court, dated 23rd July, 1926. S. 33 of the Provincial Small Cause Courts Act directs that, when a Court is invested with the jurisdiction of a Small Cause Court it is for the purposes of the Civil Procedure Code with respect to the exercise of that jurisdiction a different Court from the Court which it is in respect of the exercise of its jurisdiction in suits which are not cognizable by the Court of Small Causes. From this it is clear that for the purposes of the Civil Procedure Code the lower Court when exercising its Small Cause jurisdiction is not exercising its Ordinary Original Civil Jurisdiction. It seems clear to us, therefore, that the notification under the Act of 1877 does not apply to the lower Court when exercising its Small Cause jurisdiction. In the exercise of that jurisdic-

Kutbuddeen Sahib v. Periyanayaga Padayachi.

tion the lower Court is invested with the jurisdiction of a Court of Small Causes and is so far divested of its Original Civil Jurisdiction. Indeed it is obvious from the very difference in powers which the Judge exercises in his original jurisdiction from those he exercises in Small Cause jurisdiction that the jurisdictions are different and the Courts therefore different.

It is significant that in the original section 538 of Act X of 1877 the Courts of Small Causes in the Presidency towns were definitely named as Courts to which sections 532 to 537 applied. It is hardly likely that the legislature intended that the only Courts to which the sections should not apply were Courts of Small Causes in the muffusal. It would be an unintelligible anomaly that the constituted Courts of Small Causes in the muffusal should not be able to employ these sections, while Courts alongside them invested with the powers of Courts of Small Causes should be able to employ them.

The question raised is a matter of first impression and no direct authority has been cited to us. A ruling in *Sankararama Aiyar* v. *Padmanabha Aiyar*,[1] that for purposes of section 24 of the Civil Procedure Code a Court invested with the powers of a Small Cause Court is a Court of Small Causes is along the same line of reasoning and dissents from the ruling in *Ramachandra* v. *Ganesh*[2] relied on by the respondent which is also dissented from in a later decision of the same Court in *Narayan* v. *Bhagu*.[3]

We therefore hold that the lower Court exercised a jurisdiction not vested in it by law and its proceedings are therefore without jurisdiction and must be set aside. The decree of the lower Court is set aside and the lower Court is directed to rehear the suit in accordance with law. The petitioner will get his costs in this Court and costs in the lower Court will abide the event.

A.S.V. —— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Chockalinga Pandaram .. *Petitioner** (*Accused*).

Chockalinga Pandaram, *In re.*

Criminal Procedure Code, S 264—Record—What constitutes—Summary

---

*Cr Rev. Case No. 660 of 1927. 30th November, 1927.
(Cr. R P. No. 589 of 1927).

1. (1912) I.L.R. 38 M. 25: 23 M.L.J. 373.
2. (1899) I.L.R. 23 B. 382.
3. (1907) I.L.R. 31 Bom. 314 (F.B.).

Chockalinga Pandaram, *In re.*

trial by Magistrate or Bench—Appeal—Power of Appellate Court to look into complaint and sworn statement.

Under section 264 of the Criminal Procedure Code the only record in the case is the judgment and, consequently, the appellate Court has no power, in an appeal from a case tried summarily by a Magistrate or Bench, to go beyond this record and look into the complaint and the sworn statement of the complainant.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Saidapet in Criminal Appeal No. 15 of 1927 preferred against the judgment of the Court of the 3rd Class Bench Magistrates of Sriperumbudur in B.C. No. 25 of 1927.

C. Narasimhachari for petitioner.

The Public Prosecutor for the Crown.

The Court delivered the following

ORDER:—This is an application to revise the order of the Sub-divisional Magistrate of Saidapet confirming the conviction of the petitioner under section 352 of the Indian Penal Code.

Mr. Narasimhachariar for the petitioner contends that the lower appellate Court was not justified in looking into the complaint and the sworn statement of P.W. 1 in weighing the evidence. His argument is that under S. 264 of the Criminal Procedure Code the only record in the case is the judgment which embodies the substance of the evidence in the case and the appellate Court cannot go beyond the record, and the complaint and the sworn statement are outside the record of the case. The argument no doubt would sound strange but for the fact that the terms of the section are such as to support the contention. Section 264 is in these terms:

(1) "In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263."

(2) "Such judgment shall be the only record in cases coming within this section."

In cases in which an appeal lies the Bench or Magistrate trying the case summarily is required to record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263, such as serial number, date of the commission of the offence, date of the report or complaint, name of the complainant, plea of the accused, etc. The record of a case tried under section 264 could only be the judgment em-

Chockalinga Pandaram, *In re.*

bodying the substance of the evidence and other particulars mentioned in section 263. That being so, the question is whether the lower appellate Court was justified in referring to the complaint and sworn statement in hearing the appeal.

The question really is whether the terms of the section should be understood in the literal sense or whether they should be understood as meaning that the record made by the Court should only be the judgment in the case. It is contended by the learned Public Prosecutor that material objects and documentary evidence filed in the case can be looked into by the appellate Court and not merely the judgment. Even the substance of documentary evidence, like the oral evidence, has to be embodied in the judgment according to S. 264. That being so, medical certificates and documents of title produced by the accused to support the case of *bona fide* assertion or defence of possession cannot be looked into as their substance is required to be embodied in the judgment. When the terms of the section clearly say that such judgment shall be the only record in cases coming within this section, I do not think the Court will be justified in giving them an interpretation which the Court may consider reasonable in order to enable the appellate Court to try an appeal properly. If the Bench or Magistrate trying the case summarily does not correctly embody the substance of the evidence, there is no remedy for such defect or even a mistake. The legislature for reasons best known to itself has laid down that in the case of summary trials the judgment with certain particulars shall be the record and the appellate Court is not justified in travelling outside the record in hearing an appeal from the conviction in a summary trial. Though this particular point under consideration is not covered by authority, yet there are a number of cases in which it was held that the record of the case was the judgment. In *Nagoor Kanni Nadura* v. *Sithu Naick*[1] Jackson, J., held that the judgment was the only record in cases coming under section 264. In *The Crown* v. *Salig Ram*[2] it was held that in a summary trial, whether appealable or non-appealable, no formal charge in writing need be framed, and the reasoning was that as the judgment was the only record in the case it was unnecessary that a formal charge should be framed. In *Madhab Chandra Saha* v. *Emperor*[3] it was similarly held that no formal charge need be framed in a case tried

1. (1926) 52 M.L.J. 32. 2. (1926) I.L.R. 7 Lah. 303.
3. (1926) I.L.R. 53 C. 738.

Chockalinga Pandaram, *In re.*

under section 264 as the only record thereunder was the judgment containing the particulars set out in section 263. Considering the clear terms of the section and the fact that no charge need be framed in writing, I think the contention of Mr. Narasimhachariar ought to be upheld. I, therefore, hold that the lower appellate Court was not justified in looking into and relying upon the complaint and the sworn statement in trying the appeal.

I set aside the order of the Sub-divisional Magistrate and direct him to restore the appeal to file and dispose of it according to law.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

S. R. Nanjunda Chettiar .. *Petitioner* (Counter-petitioner)*

v.

Nallakaruppan Chettiar .. *Respondent (Petitioner).*

Nanjunda Chettiar *v.* Nallakaruppan Chettiar.

Civil Procedure Code, S. 73 and Order 21, R. 10—Decree passed by one Court—Execution proceedings against the properties of the same judgment-debtor pending in another Court—Order of transfer of the decree from the former Court to the latter—Execution application in the latter Court before it actually received the decree—Jurisdiction of the Court to entertain—Assets received by transferee Court before it got the decree by transfer—Right of decree-holder to rateable distribution.

An execution application must be filed either in the Court which passed the decree, or, if the decree has been sent to another Court, to that Court. But it cannot be made to a Court in anticipation that it may subsequently receive the decree by way of transfer. A mere order of transfer of the decree does not vest the Court, to which the decree is ordered to be transferred, with jurisdiction to receive the execution application, before the decree is actually received by that Court.

Where a decree-holder, who had obtained an order of transfer of his decree to a Court which was executing another decree against the properties of the same judgment-debtor, put in an execution application to that Court before the receipt of assets by that Court by the sale of the properties, but his decree itself was actually received by that Court only subsequent to the receipt of the assets by that Court

Held, that he was not entitled to rateable distribution of the assets.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Subordinate Judge of Coimbatore, dated 25th January, 1926, in E.A. No. 834 of 1925 in Original Suit No. 127 of 1923.

---

*C.R.P. No. 775 of 1926. 17th January, 1928.

Nanjunda Chettiar v. Nallakaruppan Chettiar.

M. Krishna Bharathi for petitioner.

T. S. Ananthararaman for respondent.

The Court delivered the following

JUDGMENT:—Petitioner seeks to revise the order of the Subordinate Judge of Coimbatore in E.A. No. 834 of 1925.

The petitioner obtained a money-decree against one M. S. Pandaram, and in execution sold on 14th October, 1925, three mortgage debts, drawing the money on 15th October, 1925.

The respondent had obtained a decree against the same person in the Court of the District Munsif of Coimbatore. Its transfer for execution to the Court of the Subordinate Judge was ordered on 12th October, 1925. On 14th October, 1925, the respondent filed his execution application. On 15th October, 1925, the records were received from the District Munsif. The question for determination is whether the respondent's application of 14th October, 1925 was an application to the Court for the execution of decree for the payment of money as contemplated by section 73, Civil Procedure Code.

There is no doubt that such application must be to the Court which passed the decree or if the decree has been sent to another Court, then that Court, *vide* Order 21, Rule 10, Civil Procedure Code. That is to say, an application cannot be made to a Court in anticipation that it may subsequently receive the decree by way of transfer. Then the question resolves itself into this, whether the District Munsif's order of transfer, dated 12th October, 1925, vested the Subordinate Judge with jurisdiction to receive the execution application of the 14th October. The learned Subordinate Judge thought that it did; "the decree having been ordered to be transferred on 12th October, 1925, it matters very little as to the date on which it was received." But such an operative order of transfer does not seem to be contemplated by the Code. The mode of transfer in Order 21, Rule 5; Civil Procedure Code is by dispatch of the decree, and a Court is presumably only seised with authority to execute when it has received the decree. The learned Subordinate Judge seems to agree that this is the sense in which the relevant sections of the Code should be read, but gets over them by observing that they are directory and not mandatory.

But that formula hardly helps in the present case. A Court must obtain jurisdiction by some definite act. If the receipt of the decree from the Court which passed it is not the essential

Nanjunda Chettiar v. Nallakaruppan Chettiar.

act, what is? It is not enough to say that the receipt is discretionary, or that the mere dispatch is enough; and a Court cannot arrogate jurisdiction to itself. It must be held, therefore, that until a Court has received the decree it has no jurisdiction to entertain an application for execution, and the application of 14th October, 1925, cannot help the respondent. There is no equity in these cases; within certain defined limits the statute allows rateable distribution and otherwise parties are left to their own devices.

The petition is allowed with costs and the order of the lower Court is cancelled.

N.S. —— *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD SHAW, LORD ATKIN, LORD SALVESEN AND SIR LANCELOT SANDERSON.

A. T. K. P. L. M. Muthiah Chetti .. *Appellant** (*Plff.*)

v.

Palaniappa Chetti and others .. *Respondents* (*Defts.*)

P. C. — Muthiah Chetti v. Palaniappa Chetti.

Limitation Act (1908), *Art* 11—*Civil Procedure Code* (1908), *O.* 21, *R* 63—*To found a claim petition, the property must be* de facto *attached—Attachment, a 'real thing' and indispensable—Mere order for attachment, insufficient—Order rejecting claim petition, when a nullity*

To attract the operation of Art. 11 (1), Limitation Act, 1908, it is a requisite of the 'order' therein specified (namely, 'an order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution of a decree'), that the property to which a claim is made, or to the attachment of which there is an objection, must be property which had been *de facto* attached in execution. "Unless there has been attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached; and without such an order, there is no *terminus a quo* for the running of limitation, and with this the limitation itself is non-existent The first head of Art. 11 can on its words mean nothing else."

The attachment is a 'real thing'; the property must, *in point of fact,* be attached, a mere order for attachment not being sufficient for this purpose. "The order is one thing, the attachment is another. No property can be declared to be attached unless *first* the order for attachment has been issued, and *secondly* in execution of that order the other things prescribed by the rules in the Code (Order 21, Rules 43, *et seq*) have been done."

The Privy Council repelled the suggestion that a property was in law attached whenever an order for attachment was made. The result, if

*P. C Appeal No. 70 of 1926. 12th March, 1928.

P. C.

Muthiah Chetti v. Palaniappa Chetti.

this were so (as their Lordships pointed out), would be that a person holding an order could dispense with attachment altogether, as an operation or a fact. "Under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something to be done and effected before attachment can be declared to have been accomplished."

On the 14th February, 1910, the respondents Nos. 5—12 filed a suit against their debtors (now represented by respondents Nos. 1—4) to recover a money-debt, and on the 14th March, 1910, they applied for attachment before judgment of their debtors' immoveable property. The Court on the 18th March passed an order for conditional attachment, which was made absolute on the 4th April, 1910. In point of fact, although attachment before judgment was thus ordered, no attachment had been actually made. Meanwhile, on the 19th March, 1910, the respondents 1—4 executed a mortgage of the same property in favour of the present plaintiff. The respondents 5—12 proceeded with their suit aforesaid and obtained a money decree against their debtors on the 24th January, 1911. Thereafter, under the mistaken impression that there had been an attachment already, the decree-holders (respondents 5—12) applied for execution of their decree by issue of a sale proclamation in respect of the property which was believed to have been so attached before judgment. The present plaintiff, acting under the like mistaken impression, put in a claim petition (purporting to be under Order 21, Rule 62, Civil Procedure Code, 1908) on the 20th March, 1912 to the property in respect of his mortgage, dated the 19th March, 1910, and prayed that the property should be sold subject thereto. The plaintiff's claim was rejected on the 15th April, 1912, the Court holding that the alleged mortgage was a sham transaction. On the 4th November, 1912, the property was purchased in execution of their decree by the decree-holders themselves (*i.e.*, the respondents 5—12), they having obtained permission to bid.

After certain infructuous proceedings (not material for the purpose of this *head-note*), the present suit was instituted by the plaintiff on the 7th October, 1915, for recovery of moneys due on his mortgage bond, dated the 19th March, 1910, with the usual prayer for sale. It was pleaded in defence that the suit was barred by Art. 11, Limitation Act, 1908, having been brought more than one year from the 15th April, 1912, the date of the dismissal of the claim petition by the Executing Court.

Held, reversing the High Court and concurring with the learned Trial Judge, that the suit was not barred by limitation, as the plaintiff was not a person against whom an 'order' as described in Art. 11, Limitation Act, 1908 (as read with Order 21, Rule 63, Civil Procedure Code, 1908), had been made. The property to which the claim was made by the plaintiff on the 20th March, 1912, not having been *de facto* attached, although for some time the parties had assumed that it was, there was no basis for the claim petition, and consequently the order of the Court, dated the 15th April, 1912, dismissing the said petition was not merely defective in form, but was *ab initio* a nullity.

Appeal No. 70 of 1926 from a decree, dated the 1st September, 1921, of the High Court, Madras (Oldfield and

P. C.

Muthiah Chetti v. Palaniappa Chetti.

Ramesam, JJ.), affirming (upon a different ground) a decree of the Temporary Subordinate Judge of Sivaganga, dated the 19th December, 1916.

The facts of the case appear sufficiently from the judgment of their Lordships, and also from the reports of the case in the High Court; *see* (1921) I.L.R. 45 M. 90: 41 M.L.J. 594.

The decision of the Subordinate Judge on the first issue (whether the suit is barred?) was as follows:—

"It has been argued by the learned vakil for defendants 10 and 11, that, as the suit was brought more than one year after the dismissal of the claim petition, it is barred and that plaintiff is not entitled to get any relief in this suit. I do not think that this position is tenable. In the first place, there was no attachment over the properties. The mere order for attachment is not sufficient to show that there has been attachment. The right to put in a claim petition arises only after the properties are attached. In this case, the parties were under the mistaken impression that there was an attachment and under that impression a claim petition was put in. The claim was dismissed. A suit was also filed to establish plaintiff's right to the property, but that suit was withdrawn when it was found that there was no attachment. The proceedings were conducted under a mistake of fact and it is not open to the contending defendants now to say that, as no suit was brought within one year of the dismissal of the claim petition, the suit is barred. Even if it is assumed that there was a valid order dismissing the claim petition, the order only said that the property should not be sold subject to the hypothecation right. The present suit is not one to establish plaintiff's right to the property, but it is a suit to recover a debt which has been charged upon the property and according to the ruling of the Calcutta High Court in *Bhiku* v *Shujat Ali*,[1] the present suit is not barred by limitation under Art. 11 of the Limitation Act. The same view has been taken by the High Court of Bombay in *Ganesh* v. *Damoo*.[2] I, therefore, find that the suit is not barred by limitation."

Dunne, K. C., and *Narasimham* for appellant.

De Gruyther, K. C., and *Parikh* for respondents.

12th March, 1928. Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW :—This is an appeal from a decree dated the 1st September, 1921, of the High Court of Judicature at Madras, affirming a decree dated the 19th September, 1916, of the Temporary Subordinate Judge of Sivaganga.

The suit out of which the appeal arises was brought by the appellant as mortgagee for recovery of moneys due on his

1. (1901) I.L.R. 29 C. 25. 2. (1916) 18 Bom. L.R. 782.

P. C.

Muthiah Chetti v. Palaniappa Chetti.

Lord Shaw.

mortgage bond about to be referred to. That bond is dated the 19th March, 1910.

Muthiah Chetti and Raman Chetti were undivided brothers; the former was father of respondents 1 and 2, the latter father of respondents 3 and 4. They carried on a money-lending business at Rangoon. They both died prior to the date of the mortgage in question. After their deaths the respondents 1 to 4 still formed a joint and undivided Hindu family. They were, however, all minors, their guardians being Nagamai Achi, mother of the first two respondents, and Sittall or Minakshi Achi, mother of the respondents 3 and 4.

This mortgage dated the 19th March, 1910, was executed by the two ladies on their own behalf and on behalf of their respective sons. It was in favour of the present appellant, who is the brother of one of the ladies. Respondents Nos. 5—12, or their representatives, also had a money-lending business, and on the 14th February, 1910, they had brought a suit against the beforementioned minors claiming a decree for a debt of Rs. 38,413. On the 14th March, 1910, that is to say, five days before the mortgage under investigation, they made an application to the Court for attachment before judgment of the immovable properties belonging to the respondents 1—4, and on the 18th March the Court passed an order for conditional attachment. On the following day the two ladies executed the mortgage which is the subject of this suit. It covered all the properties belonging to respondents 1—4, that is, to the minors aforesaid. It purported to have been for a consideration of Rs. 35,000, of which Rs. 1,800 was alleged to have been paid in cash.

On the 4th April, 1910, the Court made an order absolute. It was in the following terms:—

"No objection to attachment subject to mortgage already created in favour of Muthu Chetty. Petitioner does not admit any such mortgage at present and wants the attachment as asked for. Attachment and order made absolute."

So far as the question of limitation is concerned, this order and its date form the crucial points for consideration of the question of limitation to be afterwards discussed.

The respondents 5—12 proceeded with their action, obtained decree thereunder on the 24th January, 1911, and having applied for execution of their decree by sale with permission to bid, the present appellant put in a claim and petition on the 20th March, 1912, to the properties in respect of his mortgage and prayed that the properties should be sold subject thereto.

P. C.

Muthiah Chetti v. Palaniappa Chetti.

Lord Shaw.

The appellant's claim was rejected by the Court on the 15th April, 1912, which held that the alleged mortgage was a sham transaction.

On the 4th November, 1912, the properties were purchased by respondents 5—12 and a sale certificate was issued. Thereupon the appellant filed a suit in the Subordinate Judge's Court to establish his right to the properties under the mortgage already mentioned of the 19th March, 1910.

In the course of that suit an important and vital fact was discovered, namely, that although, as already mentioned, on the 4th April, 1910, the "attachment and order were made absolute," yet in point of fact no attachment had been made. This was explained to the Court, and on the 15th August, 1914, "the plaintiff was allowed to withdraw his suit with permission to bring another based on the mortgage bond in question but correctly framed." The present suit was accordingly brought on the 7th October, 1915. It is an ordinary suit for recovery of the amount of the mortgage with interest, and it includes a declaration that the right set up by the purchasers is invalid, and for recovery from the respondents 1—4 of the sum of Rs. 64,764, being the mortgage amount with accumulated interests and costs, with, of course, the further direction for sale.

This suit is resisted upon two grounds. First, that it is excluded by limitation and, secondly, that the mortgage was what in language adopted in various orders in the proceedings is denominated a sham transaction.

As to the question of limitation, the point taken was agreed by the learned counsel at the Bar to be an important one in Indian practice, and the differing judgments in the present case upon the point seem also to show this.

It depends upon the language of Article 11 of Schedule 1 of the Indian Limitation Act, 1908, which is as follows:—

Description of Suit.	Period of Limitation	Time for which period begins to run.
11. By a person, against whom any of the following orders has been made to establish the right which he claims to the property comprised in the Order:— (1) Order under the Code of Civil Procedure, 1908, on a claim preferred to, or an objection made to the attachment of, property attached in execution	One year.	The date of the order.

P. C.

Muthiah Chetti v. Palaniappa Chetti.

Lord Shaw.

It is to be noted that by Order 21, Rule 63 of the Code of Civil Procedure, 1908, it is provided as follows:—

"63. Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

The point to be considered is—Is the appellant a person against whom an order as just described has been made? The Board is of opinion in the negative. By Article 11 of the Limitation Act already quoted, he must be a person against whom an order has been made under the Civil Procedure Code "on a claim preferred to, or an objection made to the attachment of, property attached in execution." The case thus comes to be narrowed down to whether it is a necessity of the order here specified that the property to which a claim is made, or to the attachment of which there is an objection, must be property which had been *de facto* attached.

It would seem to be so by the words, and by the very nature of the case, for the only property referred to is "property attached in execution." Unless there has been attachment, there can be no order made on an objection lodged to it, nor can any claim be made to the property so attached; and without such an order, there is no *terminus a quo* for the running of limitation, and with this the limitation itself is non-existent. The first head of Article 11, in the opinion of their Lordships, can on its words mean nothing else.

It is only in view of the asserted importance of the point on the construction of the Civil Procedure Code that their Lordships think that it may not be inexpedient to carry this investigation of the topic further.

It may be pointed out that if the words of the article were otherwise construed, then it might be possible under such a construction to write out a not inconsiderable portion of Order 21 applicable to the execution of decrees and orders.

A fasciculus of clauses, beginning at Rule 41 of Order 21 and applicable to "attachment of property," shows in instance after instance that attachment is a real thing, with a variety of real applications suited to the nature of the property to be attached. Where it is moveable property it is to be attachment by "actual seizure"; where it is agricultural produce the attachment is to be made by affixing a copy of the warrant—on the land where there is a growing crop, and on the threshing floor,

P. C.

Muthiah Chetti
v.
Palaniappa Chetti.

Lord Shaw.

and other places where produce has been cut and gathered. In the case of an attachment of debt, there is to be a written order prohibiting the creditor from recovery, and the debtor from making payment, and prohibiting the handing over of the property by any one in whose name it stands, and this order is to be affixed publicly to the Court-house. There are other provisions as to the attachment of shares of moveables, even shares of salary, and as to attachment of partnership property. In regard to negotiable instruments, the attachment is to be by actual seizure of the instrument which is to be brought into Court.

These instances go to show that under the Civil Procedure Code in India the most anxious provisions are enacted in order to prevent a mere order of a Court from effecting attachment, and plainly indicating that the attachment itself is something separate from the mere order, and is something which is to be done and effected before attachment can be declared to have been accomplished.

It may now be considered necessary, however, to cite Order 21, Rule 54, applicable to a case like the present, namely, that of immoveable property. It is as follows:—

"(1) Where the property is immoveable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge.

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property, and then upon a conspicuous part of the Court-house, and also where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate."

In view of these provisions the Board listened with some surprise to a protracted argument which culminated in the proposition that a property was in law attached whenever an order for attachment was made. The result, if this were so, would be that a person holding an order could dispense with attachment altogether, as an operation or a fact. Their Lordships need not repeat in another form these propositions. The order is one thing, the attachment is another. No property can be declared to be attached unless first the order for attachment has been issued, and secondly in execution of that order the other things prescribed by the rules in the Code have been done.

P. C.

Muthiah Chetti v. Palaniappa Chetti.

Lord Shaw.

Their Lordships now ask whether attachment took place in the present case. Fortunately the pronouncements of both Courts make the point clear. The Subordinate Judge says:

"The mere order for attachment is not sufficient to show that there has been attachment. The right to put in a claim petition arises only after the properties are attached. In this case, the parties were under the mistaken impression that there was an attachment and under that impression a claim petition was put in."

The High Court says:

"Reference has already been made to the fact that, although a conditional attachment before judgment was ordered, none was actually made. This is said to have been due to delay in payment of fees. But neither plaintiff nor 5th to 10th defendants were, so far as appears, aware of the fact; and the latter proceeded as though there had been an attachment, to obtain issue of a sale proclamation."

It was further, of course, frankly admitted before the Board that these statements could not be impugned. In these circumstances their Lordships think it unnecessary, the view upon the order being so far to the effect already stated, to enter upon a discussion of cases cited to the Board, none of which seem to have a very direct bearing upon the point in hand. For the case before the Board is not that the order was defective in form; the order was from the beginning a nullity. After full consideration they think that the judgment of the Subordinate Judge to the following effect is right:—

"It has been argued by the learned vakil for defendants 10 and 11 that, as the suit was brought more than a year after the dismissal of the claim petition, it is barred, and that plaintiff is not entitled to get any relief in this suit. I do not think that this position is tenable. In the first place there was no attachment over the properties";

and then follows the passage already cited.

He adds:

". . . the present suit is not barred by limitation under Article 11 of the Limitation Act."

Their Lordships think this judgment was right.

The High Court appears to have been moved to a reversal of the judgment of the Subordinate Judge on this question of limitation by the consideration that although the property was not attached, yet for some time both parties had assumed that it was. What happened was that when (in?) a suit for declaration that the present properties were liable to be sold in Court auction subject to the plaintiff's mortgage lien, it was in the course of the proceedings discovered that the property had, as already explained, never been attached. The Temporary Subordinate

P. C.

Muthiah Chetti v. Palaniappa Chetti.

Lord Shaw.

Judge thereupon made an order, dated the 15th August, 1914, as follows:—"I allow the plaintiff to withdraw the suit with permission to bring another based on the mortgage bond in question, but correctly framed."

The present suit was accordingly brought. Viewed merely as a mortgage suit it is, of course, in time. But this new suit is said to be barred by the fact that it is out of time, because of the order of attachment, which subjects those bound by it to a limitation of twelve months from the order (on the claim petition?), that is to say, in this case from a thing which was a nullity.

No case of estoppel can arise. It is not pleaded: and it would be somewhat difficult for a case to be figured in which out of the fact of mutual error there had in effect been a twofold result, namely, (1) that a statutory requirement had been jumped over, and (2) that a limitation as from the date of a nullity had begun to run against one of the parties to the error. The Board, for the reasons stated, is of opinion that the suit is not barred by limitation.

In view of the differences of opinion in the Courts below with regard to the merits of the case, their Lordships have thought it right to examine for themselves the entire documents and evidence. The strength of the respondents' argument is undoubtedly this, that upon the 19th March, 1910, during the dependence of the suit for debt in which on the 14th an application was made for attachment and on the 18th a conditional order of attachment was made—on the 19th March suddenly the mortgage sprang into being, a mortgage founded upon old standing and accumulated debt, and also upon various obligations verified or alleged to be verified by hundis, all of which hundis also sprang into being on the very same date.

It is not unnatural that circumstances such as this should raise in the mind of Judges trying the case a determination to be satisfied with the authenticity of the mortgage and also of the grounds upon which it was founded. Nor is it to be altogether wondered at that a certain suspicion should attach to a transaction in which debts are suddenly amassed, consolidated into one, and a mortgage granted in the nick of time so as to accomplish the complete defeat (for in the circumstances that is what it appears to come to) of the action for debt then pending against the mortgagors. Further, it is no doubt true that, on looking to the relationship of parties and to the mortgage being granted in favour of the brother of one of the two

mothers who were guardians of children in minority, the Court would be justified and indeed bound to make such a scrutiny.

But, on the other hand, if the debts for which the mortgage was granted cannot be displaced as *bona fide* debts, and if the mortgage in its authenticity and its execution cannot be impugned, then the consolidation at the particular period was a piece of family policy not contrary to law, although open to full scrutiny in judicial proceedings. To the former of these views the Subordinate Judge inclined, to the latter the High Court.

After their investigation referred to, their Lordships are unable to resist the conclusion that the examination in minute detail by the High Court reached a sound result.

One of the controlling circumstances of the case on fact is that the main item of debt contained in the mortgage—amounting to over Rs. 18,000—takes its beginning in 1896 in an item of over Rs. 8,000 as verified by an entry in the books of the money-lending firm when it consisted of the two brothers Muthiah Chetti and Raman Chetti. That entry, however, is followed year by year in the books or extracts therefrom produced in the course of the proceedings, and year by year the interest and compound interest are added until the sum contained in the mortgage of Rs. 18,000 is reached. The respondents do not seem to have addressed themselves to the task of challenging such entries as vouchers of a real debt.

The next outstanding feature of the case is that with regard to the hundis there was by the nature of the case outside evidence obtainable, and a searching challenge could have been made which does not appear to have been attempted, the truth being that in the proceedings before the Trial Judge too much reliance appears to have been placed on suspicion only, the suspicion already referred to arising out of the conjuncture of dates. The High Court, however, pursuing its scrupulous examination, has deleted an item as unvouched amounting to Rs. 1,800 alleged to be a cash payment, and in the decree to be pronounced the mortgagees' rights will be limited accordingly.

Upon the whole, their Lordships think that the High Court's careful judgment on the merits is sound and they will humbly advise His Majesty accordingly.

The suit not being barred by limitation, the case will be remitted to the High Court for the purpose of making the appropriate decree in favour of the plaintiff and to take such proceedings as are necessary to carry out that part of the High

P. C.
Muthiah Chetti v. Palaniappa Chetti.
Lord Shaw.

Court's judgment of the 1st September, 1921, which is hereby approved.

Their Lordships will humbly advise His Majesty to allow the appeal and to remit to the High Court to be proceeded with as above stated. The respondents will pay the costs in the Courts below and of this appeal.

Solicitor for appellant : *H. S. L. Polak.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Babu *alias* Govinddoss Krishnadoss, minor by next friend M. Lauldoss .. *Plaintiff**

v.

(1) Gokuldoss Govardhandoss, (2) Dwarakadoss Govardhandoss, (3) Ramadoss Dwarakadoss, (4) Rathabhoy, (5) Kannubhoy and (6) Official Assignee of Madras .. *Defendants.*

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhandoss

Hindu Law—Joint family—Partition—Deed effecting—Effect—Partition as regards all the members or as regards some only—Construction of deed—Physical division of some items of property—Deed not effecting—Effect—Deed of partition clearly and unambiguously effecting severance as regards all—Evidence extrinsic to control or alter—Admissibility—Divided status—Evidence—House-keeping and worship—Expenses of—Division into shares of—Re-union—Hindu with minor son—Re-union with brother with minor son—Validity of—Status of minors—Effect of re-union—Restoration of coparcenary—Proof of re-union.

Where an award in writing, which effected a partition of joint family properties, plainly and unambiguously effected an out-and-out partition among all the members of the joint family, *held*, that extrinsic evidence was inadmissible to explain or control its terms, to show, for instance, that there was no separation between two of the members *inter se*. No amount of acting by the parties can alter or qualify the plain and unambiguous words of the instrument.

Held, on a construction of the award, that it effected an out-and-out partition among all the members of the family.

Physical or *de facto* division is not essential to a separation; an agreement between the members to hold the joint family property in defined shares

---

*C.S. No. 622 of 1923. 2nd May, 1928.

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

as separate owners is enough to operate as an immediate partition. From the mere fact, therefore, that there was not a division by metes and bounds in regard to certain items, it does not follow that the deed of partition did not effect a severance.

Where it was contended that an award effecting a partition of joint family properties did not effect a severance as between two of the members of the family *inter se*, but it appeared that, immediately after the partition, those two members agreed to bear their house-keeping expenses in certain defined shares, *held*, that that circumstance afforded the most cogent evidence to show that the deed was intended to effect a separation as between those two members *inter se*.

A member of a joint Hindu family, having a minor son, can effect a partition between himself and his brother, also having a minor son, so as to affect the status of the minor as regards his uncle. There is nothing in the Hindu law to prevent the member from entering into a re-union with his brother, the sons of both continuing to be minors at the time of the re-union, so as to confer upon the minor son the status of a reunited member.

Re-union does not merely give rise to a rule of preferential succession On the other hand, it cancels the partition and remits the parties to their original status and they thereby become subject to all the incidents of a Hindu co-parcenary.

Jointness in residence, food and worship does not necessarily connote re-union.

Division into shares of expenses of house-keeping and of worship is essentially a characteristic of a separated status.

Re-union is of very rare occurrence, and must be strictly proved.

S. Doraiswami Aiyar, S. Varadachariar, V. Ganapati and *P. Balasubramanian* for plaintiff.

V. C. Gopalaratnam for 1st defendant.

V. Radhakrishniah with *P. Veeraraghavan* for 2nd defendant.

K. Rajah Aiyar and *V. Ramaswami Aiyar* for 3rd defendant.

Nugent Grant (in the initial stage) and *Sir C. P. Ramaswami Aiyar* (later on) with *R. N. Aingar* and *O. T. Govindan Nambiar* instructed by *Sell* of Messrs. King and Partridge for Official Assignee.

A. Krishnaswami Aiyar for Maharaja of Pithapuram (Plaintiff in C. S. No. 229 of 1924).

The Court delivered the following

JUDGMENT :—The dispute in this case relates to property valued at several lakhs, and the points that have been raised have been argued very fully. In the following genealogical table,

Babu *alias* Govinddoss Krishnadoss *v.* Gokuldoss Govardhandoss.

which sets forth the relationship of the parties, are also noted certain important dates :—

Ramdas Ghanshamdoss, d. 17th October 1879, m. Kamalabai or Akka.

- Muralidoss, d. 24th April 1907, m. Yasodabai or Jessubai or Jessu.
  - Putlibai *alias* Nani or Nanu, m. Laul-doss
    - Jaya-krishna died young.
  - Krishnadoss, b. 16-5-84, d 13-8-08, m. Radha-bai (4th Deft.)
    - Babu *alias* Govinddoss, b. 18th Nov. 1907 (Pltf.).
- Govardhandoss, d. 26th Sept 1909, m. Kammubai, D. 5 d. Jany. 26.
  - Gokuldoss (1st Deft.), b. 6-4-85, m. Ganga-bai.
  - Dwarakadoss. (2nd Deft.), b. 12th Nov. '91, d. 14—1—25, m. Jamna Bai.
    - Ramdoss (3rd Deft.), b. 9—8—14.
- Balamukun-doss (d 1896), m. Rukkubai
- Bhaga-vandoss, d. 1911, m. Kun-danbai.
- Subroyadoss (alive), m. Godavari.

The principal question to be decided is, are the rights of the parties to be determined on the basis of a contract of partnership or on the footing that they are coparceners of a joint Hindu family? Ramdas Ganshamdas was carrying on trade in yarn and died in 1879. After his death, his sons continued the family trade and lived as members of a joint Hindu family. Disputes arose among them and they executed *muchilikas* (submissions) in favour of an arbitrator who, on 27th September, 1890, delivered his award in writing, effecting a partition of the family properties. The plaintiff alleges that Moralidas and Govardhandas, as a result of the partition, became the owners of the family business, and continued thereafter to trade jointly and as partners. In course of time, he goes on to allege, Krishnadas and Gokuldas were admitted into the partnership, Muralidas died in 1907, and Krishnadas in 1908, and the partnership was afterwards continued by the surviving partners, Govardhandas and his son. The former died in 1909 and the trade was continued by his sons, Gokuldas and Dwarakadas. The plaintiff claims that, as the son of Krishnadas, he is entitled to have an account taken of the affairs of the partnership, which, he contends, became dissolved on the latter's death in 1908. As the above table shows, the principal parties to the contest were the plaintiff, the 1st, 2nd and the 3rd defendants. Subsequent to the suit, the 2nd defendant died and the 1st defendant became an insolvent and his estate is now represent-

Babu alias Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

ed by the Official Assignee, Madras, who has been brought on the record as the 6th defendant.

The defence of the Official Assignee is, that the partition of 1890 did not affect the status of Muralidas and Govardhan, that it was a partial partition in regard to parties and that its effect was to sever the remaining three brothers alone from the family. He thus contends that Muralidas and Govardhandas continued to remain, as before, members of a Hindu coparcenary. Should, however, the Court hold that there was a partition between them *inter se*, he maintains in the alternative, that immediately or some time thereafter there was a re-union between them, which involves in law (so he contends) a restoration of the joint family status. Gokuldas, the Official Assignee alleges, dealt with the property not as the surviving partner but in his capacity as the managing member of the undivided joint family and that the plaintiff is bound by the acts of the said manager. The plaintiff answers, not only that there was no re-union in fact between Muralidas and Govardhandas, but that, in law, there could not have been a valid re-union. He also contends that re-union does not in law restore the original joint family status, but that it merely gives rise to a rule of preferential succession. The importance of this contention to the plaintiff is obvious. If it is accepted as sound, it follows that whether there has been re-union or not, the right which he claims in this suit remains unaffected. If re-union does not lead to a restoration of the coparcenary, with its various incidents, including the power of the manager to bind the other members by his acts it matters little to the plaintiff on the facts of this case whether it is held that there was or was not a valid re-union. The alienations of Gokuldas are sought to be made binding on the plaintiff on the supposed ground that they are the acts of a managing member and if this ground does not exist, the plaintiff's liability disappears along with it.

The questions that are raised may be thus shortly stated:—

(1) Did the partition of 1890 effect a severance between Muralidas and Govardhandas?

(2) Could there be a re-union valid in law ?

(3) Does a re-union lead to the restoration of the joint family, or, does it merely give rise to a special rule of preferential succession ?

(4) If there was a severance, was there in fact a subsequent re-union ?

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

Point 1.—The first contention for the defence is, that there was no separation between Murali and Govardhan *inter se* and that they continued to remain joint. It is suggested that there was in fact a partial partition, the other three brothers separating from the family leaving the status of Murali and Govardhan unaffected as members of a coparcenary.

It is a well-settled rule of law that where the language of a document is plain and unambiguous, extrinsic evidence cannot be received to explain or control its terms. Dealing with the point whether there was or was not a partition, the Judicial Committee laid down this rule in *Balkishen* v. *Ram Narain*[1]. The High Court, having in effect held that the instrument in question was unambiguous, proceeded to construe its terms in the light of the subsequent acts of the parties. Their Lordships while reversing the judgment of that Court, enunciate the principle, that where the instrument is plain and unequivocal, evidence of conduct cannot be received for elucidating its terms. There is a striking application of this rule in the *North Eastern Railway Co.* v. *Lord Hastings*[2]. The importance of the case lies in the fact that the parties acted upon the agreement for more than 40 years from its date, in a sense opposed to the clear meaning of the words ; but this did not prevent the Court from excluding extrinsic evidence.

Lord Halsbury observed:

"No amount of acting by the parties can alter or qualify words which are plain and unambiguous."

In the judgment in that case is cited *Clifton* v. *Walmesley*[3] which also illustrates the rigour with which this rule is applied. There are, of course, cases where extrinsic evidence was received, but that was because the words were ambiguous and of doubtful import. In *Watcham* v. *Attorney-General*[4] the instrument contained an ambiguity and evidence of user was in consequence admitted. In *Ma Thaung* v. *Ma Than*[5] the contract was "open to different meanings." *Ram Pershad Singh* v. *Lakhpati Koer*[6] belongs to the same category. The partition was effected by a decree which, as the head-note points out, was ambiguous. It was so "imperfect in form" that

1. (1903) 30 I.A. 139: I.L.R. 30 C. 738 (P.C.).
2. (1900) A.C. 260.
3 (1794) 5 T.R. 564.
4. (1919) A.C. 533.
5. (1923) 51 I.A 1 : I.L.R 51 C 374 (382) : 46 M L J 618 (P.C.).
6 (1902) 30 I.A. 1 : I.L.R. 30 C. 231 (P.C.).

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhan doss.

it could be relied on to support the inference of separation (*see* page 9) as also the argument, that its legal effect was to negative separation. (*See* page 10). In such cases, the Court looks at the acts done by the parties under the ambiguous deed, as affording a clue to their intention, the principle being, in the words of Lord Sugden,

"Tell me what you have done under such a deed, and I will tell you what that deed means." (*Attorney-General* v. *Drummond*.[7])

Sir C. P. Ramaswami Aiyar for the defence has made a strenuous effort to show that there is an ambiguity in the partition award in question, and I shall now proceed to closely examine the terms of that instrument. I may note that it is a long but carefully prepared document and deserves careful perusal. Of the five brothers, Subbaroyadoss (the youngest) was a minor and was represented by his mother Kamalabai. The award sets forth in great detail the properties owned by the family and the outgoings and says that the total value of the assets available for division is 1 lakh and 70,000 odd. The property is divided into five shares, each share amounting to Rs. 38,514. The net assets are ascertained only after due provision is made for the unmarried girls, the mother of the parties, the wives and sons of the major coparceners (including Murali and Govardhan). Similarly, sums are set apart for the marriages of Baghavandoss and Subbaroyadoss, two of the five brothers, whose marriages had not by then been performed. The division is complete and thorough, even such trifles as mirrors and mats not being omitted. The deed goes on to describe in what manner the share of each has been allotted. There are long and complete lists of properties set apart for each of the coparceners. The document then winds up with a very significant passage. It says that each of the parties mentioned in the deed (including again Murali and Govardhan) has separately received his share and that each shall enjoy the properties set apart for him and none of them is to have any right against the other. The last part is thus rendered by the Court Interpreter:

"So, from now, each of you shall hold and enjoy the moveable and immoveable properties accruing to his respective shares from generation to generation through sons and grandsons and with all right to gift, exchange, sell and mortgage. In the course of such enjoyment, there shall exist among you only the connection of the right of pollution hereafter and there shall not be any connection of money or debt to the least extent as amongst one another. Such is the panchayat award written and given by me."

7. (1842) 1 Dr. & War. 353 (368).

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

It is impossible to regard this document as anything but an out-and-out partition. It is difficult to express in clearer or more forcible language that the parties intended to separate each from the other. If the instrument is unequivocal, it follows that no evidence of conduct to explain its terms can be received. I shall now examine the grounds which have been put forward to support the theory that this document did not effect a severance between Murali and Govardhan.

(1) It recites that what led to the partition were disputes between Murali and Govardhan on the one side and the three remaining brothers on the other. Does this affect the nature of the transaction? Can it be urged that as there were no quarrels between the remaining three, there was no division among them *inter se*? This has not even been suggested.

(2) The scheme of the partition is this. There was a yarn business that was being carried on. The deed does not say so in terms, but there can be very little doubt that it was intended that the trade was to be taken over as a going concern by Murali and Govardhan. Three of the four houses were also assigned to them. The bulk of the property having thus been given to these two, they passed, in order to equalise shares, promissory notes for unequal amounts in favour *inter alia* of their three brothers. Each of these promissory notes was for about Rs. 30,000. It was apparently contemplated that Murali and Govardhan should live and trade together, that the other three brothers should even after separation continue to reside along with the former and practically as members of their household. This probably explains the curious fact that among the items allotted to the last three brothers, household utensils and furniture do not find a place, for, if they were not expected to maintain an independent home, why should they need them? Then again, if it was intended that Murali and Govardhan should carry on the business jointly after partition, what would be more natural than to allot to them conjointly the trade and the trade assets as a going concern? This cannot show that there was no separation between them. Why should not brothers who have ceased to be coparceners become partners? Though the value of the stock of yarn given to Murali and Govardhan was equal, the cash which also formed part of the business was unequally allotted (Murali Rs. 15,000 odd, Govardhan Rs. 18,000 odd). Though, in effect, the business as a going concern was given to these two brothers, the allotment of shares was distinct and (this I regard as important)

Babu alias Govinddoss Krishnadoss v. Gokuldoss Govardhan doss.

the concern was not assigned to them *even formally* in two equal halves; in other words, so far as the instrument goes, it effects a clear and decisive severance, although it may be spelt out from the deed that the business was jointly handed to them. In regard to the houses, similarly, they were not jointly allotted to Murali and Govardhan; on the contrary, a moiety of each of the three houses was valued and separately allotted to Murali; and that process was repeated in the case of Govardhan. These facts, far from showing that there was no division between them, prove the very reverse, namely, that they intended that their relation as coparceners should come to an end.

The contention put forward for the defence in fact amounts to saying, that because there was not a division by metes and bounds in regard to certain items, it, therefore, follows that the deed did not effect a severance. It has been repeatedly held that physical or *de facto* division is not essential to a separation. If the parties agree to hold the property in defined shares as separate owners, such an agreement, evidencing as it does an intention to separate, (for intention is the decisive test), operates as an immediate partition; there is a division of title and interest, what is postponed being a division by metes and bounds. *Appovier* v. *Ramasubba Aiyan*[8].

(3) I now pass on to the next contention. The deed says that the arbitrator was required to take an account of the business only to the 3rd November, 1888 ; but the partition was made on the 27th September, 1890. I am unable to follow the argument that this indicates that Murali and Govardhan intended to remain joint. If you have to effect a partition, you must prepare a balance sheet, which represents a state of things, as they exist on some date, nearest in point of time, to the date of the partition itself. What more convenient date can one suggest than the close of the business year? The samvat year ended on the aforesaid date, the 3rd of November 1888, and the first of the *muchilikas* (submissions) executed in favour of the arbitrator bears the date the 7th of January 1899; and the interval between the two dates barely exceeded two months. Is there anything surprising in the accounts being treated as closed shortly before the date when the arbitrator was to enter upon his duties? The argument is indeed quite untenable, for the deed itself shows that though the accounts were taken to the 3rd of November 1888,

8. (1866) 11 M.I.A. 75

interest was added upon cash and properties from the following day, the 4th of November (the commencement of the New Year), almost to the very day of the partition.

(4) It is next suggested that the shares of Murali and Govardhan were defined, not with a view to effect a severance between them, but in order to calculate their shares for enabling the other brothers to separate. This, of course, might have been done (see *Palani Ammal* v. *Muthuvenkatachala Moniagar*[9]) but, in fact, was not. There is not a single term in the deed which lends the slightest support to this contention.

I have now dealt with the arguments advanced to show that the deed did not effect a severance between Murali and Govardhan and, as I have shown, they are utterly unconvincing; but granting for a moment that the instrument is ambiguous and it is therefore permissible to examine subsequent conduct and acts of parties to throw light upon their intention, the evidence that has been adduced is, as I shall point out in a later section, more consistent with the hypothesis that there was a complete severance than that there was not. I shall at once refer to one circumstance which I regard as crucial. Immediately after the partition, Murali and Govardhan agreed to bear their house-keeping expenses in certain defined shares. This is utterly incompatible (I am here considering the theory of non-division and not re-union) with the notion that they intended to remain as before members of a coparcenary. When such an act comes close upon the heels of the partition, that, to my mind, affords the most cogent evidence, that what was intended was a separation, resulting in a disruption of the joint family.

POINT 2.

I shall now deal with the next contention, that re-union between Murali and Govardhan was legaly impossible, as each of them had a minor son in existence. The argument is put by Mr. Varadachari (for the plaintiff) in two ways: *First*, the fathers could not re-unite carrying by their act, into the re-united family, also their sons, for it is said, that under the Hindu Law, this is not one of the recognised powers of the father; *secondly*, the fathers could not re-unite, leaving out their sons, as re-union presupposes junction of estates, and they being joint with their sons, could not bring into the pact, any property. I do not think I can accede to this contention. At the time the fathers made the partition, was there any exercise

9. (1924) L.R. 52 I A. 83 : 48 M 254 · 48 M.L.J. 83 (P.C.).

Babu *alias* Govinddoss Krishnadoss *v.* Gokuldoss Govardhandoss.

of volition on the part of the sons? They being minors, *ex hypothesi*, there was not. The partition was by the different heads of the branches and their act affected of necessity the status of the sons. The partition which the fathers entered into not only separated each branch from the rest but also automatically severed each son from his uncles. The text of Brihaspathi says that certain persons who have entered into a partition can re-unite. More often than not, adult coparceners entering into a partition have sons; and if it was intended that in the event of a party having a son, he could not re-unite, it is impossible to conceive that the law-givers overlooked to provide for such an obvious contingency. The sons were but constructive parties to the partition; they must similarly be deemed constructive parties to the re-union. It is then urged that it is contrary to principle to hold that the father, by re-union, can affect the son's status. The Hindu Law does recognise the father's power to alter the son's joint family status into one of separation. There is nothing inherently illogical in the father, therefore, possessing the power of converting his son's status of a separated member into that of a re-united member. The rule of law which gives the father unqualified power to give away his son in adoption and thus alter his status and position is a parallel conception and may furnish a useful analogy. In this connection it has also to be borne in mind that the father can effect a partition among his sons *inter se* against their will. Next, the argument based on the analogy of alienations and dispositions seems to my mind equally out of place. The power to make a partition the father possesses not because of any supposed benefit he is thereby conferring upon the son, but this is recognised under the Hindu Law as a power inherent in him. It takes no notice of the possible benefit or detriment to the son; for example, by separating the son from his uncle, the father puts an end to the son's chance of succeeding to his uncle's property by survivorship. Similarly, re-union on the part of the father may in a certain event prove prejudicial to the son's interest; but it may also result in a positive benefit to him. If the son dies in a state of re-union, his uncle may exclude his widow, but if the uncle predeceases the son, the latter takes his property by survivorship. Failure to keep distinct the theory of dispositions, where benefit is generally the test, and the theory of partition, which takes no account of such benefit, must tend to confuse legal issues. I may pursue the point a little further. If the sons in existence at the parti-

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

tion are not minors but adults, does that fact present any difficulty? In this instance, the sons are either passive parties to the partition, the fathers representing them in that transaction and effecting a severance of the branches, or, they are active parties, in the sense, that, as a result of the partition, they have become severed even from their fathers. In the former case, as the fathers, by entering into the partition, necessarily affected their sons' status, similarly they may, by re-uniting, carry their sons, as a matter of course, into the re-united group. Neither at the partition nor at the re-union is there an independent exercise of volition on the part of the sons. In the latter case, the sons being not constructively but actively parties to the partition, it is open to them to join their fathers in re-uniting, or, to refuse to re-unite. It is asked, if the partition leaves the father and the son joint and undivided, does it not impose a hardship upon the son, to hold that the father, by his own act, can force the son back into the original family? The son possesses an obvious remedy, for there is nothing to prevent him from insisting on an instantaneous partition from his own father. Even granting that some extreme cases of hardship may be conceived, that is no reason why one should refuse to recognise the deductions that logically follow from the primary conceptions of the Hindu Law.

I need not deal separately with another contention, or rather another aspect of the same contention, namely, that first cousins cannot re-unite, as they are not among those mentioned in the text of Brihaspathi. The re-union alleged here is not a re-union of the first cousins. Their re-union is but incidental to the re-union of their fathers; in other words, if the fathers re-unite, that act by its own fore brings about the re-union of their sons. But if it is said that the first cousins were parties to the partition and therefore necessarily parties to the re-union, even then, there is no legal bar to the re-union, as under the Vyavahara Mayukha by which the parties are governed, a person may re-unite with any relation who was a party to the original partition. The contention advanced on behalf of the plaintiff is, therefore, unsound and must be rejected.

Point 3.—Mr. Varadachari next contends that re-union merely gives rise to a rule of preferential succession, but does not lead to a restoration of the coparcenary; when there is a disruption of a joint family, that disruption is once for all, the members who have gone asunder can never again come together.

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

Mr. A. Krishnaswami Aiyar for the defence urges, on the other hand, that re-union cancels the partition and remits the parties to their original status and that they thus become subject to all incidnts of a Hindu coparcenary. The preponderance of the authority of the commentators seems decidedly to favour the view put forward for the defence. . Where the Mitakshara prevails, a re-united brother (just as in the case of non-division) succeeds in preference to the deceased's widow. How can this be explained on the theory that re-union merely gives rise to a rule of preferential succession? If the effect of the re-union is to reject a relation not associated, in favour of a relation so associated, on what ground is a wife excluded, who lived in union with her husband during his life? The conception underlying the exclusion of the widow seems to be, that there has been a restoration of the coparcenary.

Mr. Varadachari points out that it is not a universal rule that a re-united relation is preferred to one un-re-united. He gives the following examples :—

(1) If the deceased leaves a re-united full brother and an un-re-united half brother, each takes a moiety of the property.

(2) Then, again, as between a re-united full brother and a re-united half brother, the former excludes the latter.

(3) In the case of a competition between a re-united brother and a divided un-re-united son, the latter is preferred.

(4) If the deceased leaves a re-united son and an un-re-united son, they both take together (although this rule is not accepted by all the schools).

These instances show, Mr. Varadachari urges, that the rule of survivorship does not apply in its integrity in the case of re-union. From this, he argues, that re-union does no more than give rise to a special rule of succession. I do not think it can be postulated, that because there are recognised deviations which do not fit in with the scheme of an ordinary joint family, therefore, it follows that re-union does not remit the parties to their original joint family status. It is profitless to speculate on this subject, for the question ultimately depends on, what is the true conception of a re-united family according to the ancient writers? Mr. Krishnaswami Aiyar and Mr. Varadachari have in their able arguments cited several passages from authoritative works.

Babu Lal Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

In *Viramitrodaya*, there is a discussion of the wife's right to succeed to persons separated and not re-united. Passage after passage shows that the writer assumes that a re-union leads to a re-creation of the joint family. The following is a typical passage :

"Since when the husband dies unseparated, he had no (specific) share at all, then what will the wife take? And if re-united, then although his share had been specified, it was lost by reason of the accrual of a common right over again. Nor can it be argued that there is certainly his undefined share although it is the subject of a common right. For although this be admitted, still on the death of one by whose relation the right became common, the succession of him alone whose right subsists is proper, but not the supposition of the accrual of another's right."—*Setlur's Translation*, p. 398.

Viramitrodaya is here combating the view of *Jimutavahana* that a widow is not excluded in a joint or re-united family.

Vyavaharamayukha and *Sarasvathi Vilasa* seem also to assume that re-union leads to a restoration of the joint family.

There is a passage in the Dayabagha in which this idea is forcibly brought out. It is worth reproducing and is thus rendered by *Sircar* in his *Viramitrodaya*:

"Accordingly Vrihaspati says : 'He who having been separated dwells together again through affection with the father, brother or the paternal uncle is called re-united with him.' From this text it appears that the father, brother and the paternal uncle who are from their birth likely to be united as regards the property acquired by the father and the grandfather, they alone may become re-united when having been once separated they *annul* through mutual affection the previous partition with an agreement to the effect that the wealth which is mine is thine and what is thine is mine, and remain as one householder as before in commensality and undivided (in any transaction). Those, however, who are unlike these are not to be considered re-united by reason of the mere union of property, for if that were so, then the term 're-union' would be applicable to a joint stock company of traders. Accordingly the term 're-union' is not applied to brethren who manage their estates holding them joint for the sake of convenience, but are without the stipulation based upon affection.'

Smriti Chandrika alone sounds a note of dissent. It deals with the status of re-union as a strictly contractual relation, giving rise to certain special incidents and says that the shares shall on a partition correspond to the original capital brought in by each person at the time of the re-union. There are *obiter dicta* of Sankaran Nair, J. (sitting alone) in *Alamelumanga* v. *Nambenumal*,[10] where the learned Judge accepts

10. (1914) 15 M.L.T. 352 : 23 I.C. 824.

Babu alias Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

this doctrine. But this is opposed to the decisions of this Court and I am not aware of any other case in any part of India where this view has been adopted.

I shall now examine the decided cases on the point.

Narasimhacharlu v. *Venkata Singaramma*[11] decided by Wallis and Miller, JJ., is a useful case on the point. Two brothers *A* and *B* re-united; of whom *A* died leaving *C* his son, born subsequent to the re-union. On *C's* death, who succeeded to his property, *D*, his widow or *B*, his uncle? It was held that the rule of survivorship applied and the uncle was preferred to the widow. This case establishes

First, that by re-union, a joint interest with right of survivorship is created and not merely a tenancy-in-common, and

Secondly, that the state of re-union continues with the descendants of the re-uniting parties.

In this case, it is to be observed that the lower Court took a different view, the view now pressed by Mr. Varadachari; and the judgment is valuable, as it was given after very full arguments were heard on the point.

This case (and not *Ramaswami* v. *Venkatesam*[12] as is wrongly stated in the judgment) was followed in *Nena* v. *Parbhu*[13] where the Patna High Court held that the effect of a re-union is to restore the joint family status with its incident of survivorship. When two brothers governed by the Mitakshara law, after separation agreed to be joint, stipulating, however, that they should hold the property in unequal shares, the learned Judges decided that there was no valid re-union, on the ground that the condition was opposed to the essential character of a Hindu coparcenary, relying upon the text "The property which is mine is thine, and that which is thine is mine." See also *Gopal Chunder* v. *Kenaram*.[14]

In *Krishniah* v. *Guruviah*[15] the property to be partitioned was that of re-united brothers; but the rules which guided the Court in every respect were those which would be enforced in the case of an ordinary Hindu coparcenary. The point was fully discussed by Phillips, J., with reference to the doctrine, which the learned Judge refused to accept, namely, that 'the

11. (1909) I.L.R. 33 M. 165: 19 M.L.J. 719.
12. (1892) I. L R. 16 M. 440 : 3 M. L. J. 107.
13. (1923) 75 I. C. 508.
14. (1867) 7 W. R. 35.
15. (1921) 41 M.L.J. 503

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

shares are proportionate to the capital contributed at the time of the re-union. The general principle was recognised that the rules governing the relations of parties after re-union in respect of partition are those applicable to an ordinary joint Hindu family.

Ramaswami v. *Venkatesam*[12] is relied on as supporting the opposite contention. As has been pointed out in *Narasimhacharlu* v. *Venkata Singaramma*[11] this case does no more than give effect to some express texts of the Hindu law, which modify the strict rule of survivorship in favour of un-re-united uterine brothers.

Some light is thrown on the subject by the observations of the Judicial Committee in *Prankishen* v. *Mothooramohun*[16] which have been relied on in subsequent cases. If, after separation, and before re-union, one of the brothers acquired a property out of funds which had once been joint, did the property become that of the re-united members, or, did it belong exclusively to the party who acquired it ? While holding that all the members who re-united became entitled to it, their Lordships, as the ground of their decision (apart from the deed which regulated the rights of the parties) state the rule, that re-union of brothers remits them to their former status as members of a joint Hindu family.—(*See* pages 406 and 412.)

The dicta in *Krishniah* v. *Venkataramiah*[17] (decided by three learned Judges of this Court), *Jasoda Koer* v. *Sheo Pershad*[18] and *Abhai Churn* v. *Mangul*[19] are clearly to the same effect. In at least three cases, the Judicial Committee has used language which implies that re-union remits the parties to their original status. [*Jatti* v. *Banwari Lal*,[20] *Palani* v. *Muthuvenkatachala Moniagar*,[9] *Jag Prasad* v. *Mussamat Singari*.[21]]

Cases under the Dayabagha Law dealing with succession to re-united relations can be no guide, as, whether there is re-union or not, the rule of survivorship does not apply; but there are other incidents attaching to a joint family which are common alike to the Mitakshara and the Dayabagha systems. I have not been

9. (1924) 52 I.A. 83 at 86: 48 M. 254: 48 M.L.J. 83 (P.C.).
11. (1909) I. L. R. 33 M. 165 : 19 M. L. J. 719.
12. (1892) I. L. R. 16 M. 440 : 3 M. L. J. 107.
16. (1865) 10 M. I. A. 403.
17. (1903) 19 M. L. J. 723.
18. (1889) I. L. R. 17 C. 33.
19. (1892) I. L. R. 19 C. 634 at 641.
20 (1923) 50 I. A. 192 at 195 : 45 M. L. J 355 (P. C).
21. (1924) 49 M. L. J. 162 at 172 (P. C.)

Babu *alias* Govinddoss Krishnadoss *v.* Gokuldoss Govardhandoss.

shown any case, where, in respect of a re-united family, those incidents have been held inapplicable under the Dayabagha law. I may cite a typical passage to show that the contrary is assumed.

"In other words, we think that, if a re-union actually takes place between the proper parties, their representatives and descendants, however remote, will remain joint until a fresh partition takes place, *exactly in the same manner as in an ordinary case of a joint family the members remain joint until partition.*" [*Tara Chand* v. *Pudum Lochin.*[22]]

The passage relied on by the plaintiff in *Bala Bux* v. *Rukhmabai*[23] does not help him. The partition was between two brothers Ladhuram and Girdharlal. It was alleged that there was a re-union after Ladhuram's death between Bala Bux, his minor son, and Girdharlal, his brother. Their Lordships relying upon the well-known text of Brihaspati,

"He who being once separated dwells again through affection with his father, brother, or paternal uncle is termed re-united"

observe, that a re-union, properly so called, can only take place between persons who are parties to the original partition. It is assumed that Bala Bux was not such a party. (In the report there is no clear indication of his existence on the date of the partition.) Their Lordships were further disposed to hold that a valid agreement to re-unite cannot be made by or on behalf of a minor. I fail to see how this case has any bearing on the present question. The re-union alleged in the present case is a re-union between the fathers who were parties to the partition itself, and that fact further necessarily excludes any question of minority. In the result, I am not prepared to uphold the contention of Mr. Varadachari.

Point 4: (*a*) *General.*—At the outset I must mention that though this point expressly relates to re-union, the case of non-division as well as re-union depends upon the same evidence and it is therefore needless to examine it under two separate heads. The plaintiff's case is, that the partition of 1890 effected a complete severance between the five brothers and that thereafter Murali and Govardhan traded in co-partnership. For the defence it is urged that the deed of partition did not affect their status but that if it did, their separation was followed by a re-union. Two alternative dates for re-union have been suggested: first, 1890, immediately after the partition; secondly 1900. According to the plaintiff, the partnership originally consisted of Murali and

22. (1866) 5 W.R. 249 at 250.
23. (1902) 30 I. A. 130 at 136 : 30 C. 725 (P. C.)

Babu *alias* Govinddoss Krishnadoss v. Gokuldoss Govardhandoss.

Govardhan, and 16 years afterwards, *i.e.*, in 1906, their sons, Krishnadoss and Gokuldoss were admitted into the firm as partners. He relies upon a very important piece of documentary evidence, a notice dated 19th October, 1906, published by Murali and Govardhan, in the *Madras Mail* and in the *Fort St. George Gazette* (handbills were also distributed) announcing that Krishna and Gokul were taken as partners from the 19th of October, 1906, and that the name of the firm would remain unchanged. Thus, we have a definite case of partnership as against the case of coparcenary. Which of these two versions is the correct version?

[His Lordship then fully discusses the evidence bearing on this (the fourth) point.]

The result of this investigation is that from 1898 to 1909, the parties, with whose state of mind we are concerned, repeatedly made solemn declarations, in deeds as well as in pleadings, under the guidance of several legal advisers—declarations which lead to the irresistible inference, that their status was not that of coparceners but of separated members who combined and traded as partners. If this is the effect of the documents it may be asked, where then is the conflict to which reference has been made?

* * * *

What does the announcement of 19th October, 1906, amount to? Does it or does it not accord with the theory of partnership? Till then, Murali and Govardhan represented in the partnership two distinct joint families, each representing an entity consisting of himself and his son or sons. In strict law, the partners in the business were these two individuals, *and not* the two families which they represented. By reason of the step then taken, Krishna and Gokul ceased to be what they till then were, dormant passive coparceners, but thenceforward assumed a new position, that of active partners.

I may conveniently deal here with two other arguments put forward with great force by Sir C. P. Ramaswami Aiyar. He first comments on the fact that the plaintiff has not adduced oral evidence. Is it the plaintiff's fault, that his grandfather Murali, grand-uncle Govardhan and his father Krishna are dead? As for Gokuldoss, though he may be suspected of collusion with the plaintiff, it is inconceivable that he should be cited as the plaintiff's witness, having regard to his conduct and statements since 1909. Granting that the plaintiff was so rash as to exa-

mine Gokul, would the latter imperil his position by deposing against the Official Assignee, who now represents his estate?

Adverse comment has also been made, that the plaint, as originally filed, was on the footing of a coparcenary, and that allegations in regard to partnership were subsequently added by way of amendment. When the suit was instituted, the plaintiff was a minor and was represented by his next friend, Laldas, his paternal aunt's husband. True, this man lived with the family from about 1891 and might be expected in the ordinary course to be aware of the right legal position. But the theory of coparcenary won by degrees upon those concerned from 1909 to 1923 (a period of 15 years), and Laldas, like others in this case, came to believe in the falsehood so persistently repeated. During the whole of this period, the plaintiff was a minor and he cannot be affected by what others thought or did.

(*b*) *Accounts.*—Now I pass on to another kind of documentary evidence that has been adduced. It consists of entries in innumerable account books and each side relies upon them in support of its own theory. * * * *

I have fully discussed the facts bearing on re-union. Let me now sum up the position briefly:

(1) If after Murali and Govardhan became separate by reason of the partition they carried on business jointly it would be more proper to infer that they combined to trade as partners than that they intended to revert to their original position of members of a joint family. This would not only be the proper but natural inference.

(2) Jointness in residence, food and worship does not necessarily connote re-union, no more than is a separation in these respects, conclusive proof of partition.

Choudhuri Ganesh v. *Mussumat Jewach.*[24] The facts of this case make the first part of this proposition self-evident. After the partition, it was not only Murali and Govardhan that lived together but all the five brothers, yet the alleged re-union is only between those two and not between the five. Again previous to 1900, at any rate, so far as Subbaroyadas was concerned, expenses of his mess and worship were met out of the common fund. It is not on this account suggested that Subbaroya became a member of the re-united group. Then subsequent to 1900, all the five brothers met their expenses both

24. (1903) 31 I.A. 10: 14 M.L.J. 8 (P.C.).

Babu alias Govinddoss Krishnadoss v. Gokuldoss Govardhandoss

household and worship out of the same fund, from this it is not argued, that the five brothers became re-united.

(3) Though Murali and Govardhan bore in common, certain expenses, which fact suggests a coparcenary, there were many transactions which partake of the nature of a strict accounting between the parties; and this is utterly incompatible with the theory of a joint family. Division into shares of expenses of house-keeping and of worship is essentially a characteristic of a separated status.

In this connection it is important to bear in mind the observations of their Lordships of the Judicial Committee that a re-uniting is for obvious reasons "of very rare occurrence, and when it happens it must be strictly proved as any other disputed fact is proved". See *Palani Ammal* v. *Muthuvenkatachala Moniagar*[9]; see also *Bala Bux* and *Rukhmabai*.[23]

(4) The entries in the account books by reason of their ambiguity may be inconclusive, but the declarations of Murali and Govardhan as to their own state of mind are unequivocal, and they show that they treated themselves as members of a partnership. These affirmations are particularly valuable, as they range over a long period and are found in deeds and pleadings prepared by their legal advisers.

(5) After giving due weight to such facts, as (if they stood alone), might point to a re-union, I have come to the conclusion, that the hypothesis which best reconciles all the facts of the case is, that Murali and Govardhan agreed to carry on business as partners and not to re-unite as members of a joint family.

In the view I have taken, it is unnecessary to decide whether Gokuldas exceeded his power as the managing member of a trading joint family in entering into transactions in the name of the Madras Import Co. If a finding were necessary, I am prepared to hold that the plaintiff has not made out this part of his case. Indeed, no argument has been adduced by his counsel to show that this business was in any way different from the business which had been previously carried on.

I must add that I ruled out certain documents which Sir C. P. Ramaswami Aiyar tendered in evidence as being utterly irrelevant. In adducing that evidence, he sought to show that

9. (1924) 52 I. A. 83 at 86 : 48 M. L. J. 83 (P. C.)

23. (1902) 30 I.A. 130 at 137 (P.C.).

Babu alias Govinddoss Kishnadoss v. Gokuldoss Govardhandoss.

in another Guzerati family, junior members were held out as partners although that family was undivided. He tendered a notice published in the papers to the effect that the said persons were partners; also a partition deed, which bore a date later than the notice. He puts his case thus: The partition deed being later in date, shows that on the date of the notice, the junior members in question were members of a coparcenary; in spite of that, they were publicly put forward as partners; if such a thing happened in connection with one family, why should it not be assumed that it happened in connection with another? The danger of accepting such evidence is obvious. Apart from any rule of evidence, before any conclusion can be drawn from the facts alleged, one must first find that those facts are true. In short, the Court must embark upon an enquiry as to the facts and circumstances of the family, to which the notice and partition deed relate. I have not the slightest doubt that they are inadmissible, but I have considered it desirable to give my reasons.

In the result, I declare that the plaintiff is entitled to have an account taken of the affairs of the partnership as on the date of the death of his father, namely, the 13th August 1908.

The Receiver shall pay the plaintiff as well as the Official Assignee their costs of the suit. I certify for two counsel for the Official Assignee. I fix the further remuneration of the guardian *ad litem* at Rs. 2,000 which the Receiver shall pay. (He has already been paid Rs. 500.)

In regard to further proceedings, I am asked to adjourn the case till after the re-opening and I do so accordingly.

A. S. V. *Accounts ordered to be taken.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE JACKSON AND MR. JUSTICE REILLY.

Natesa Vanniyan .. *Appellant* (3rd defendant)*

v.

Gopalasami Mudaliar .. *Respondent (Plaintiff).*

Natesa Vanniyan v. Gopalasami Mudaliar.

Covenant for title—Covenant for indemnity—Distinction—Execution purchaser—Covenant for title in S. 55 (2) of Transfer of Property Act included in right and interest of judgment-debtor if passes to—Security bond executed by third party on sale of property undertaking to compen-

---

*A. A. O. No. 90 of 1927. 19th December, 1927.

Natesa Vanniyan v. Gopalasami Mudaliar.

sate purchaser with equivalent property in case of his being deprived of property purchased—Enforcement of—Execution purchaser of purchased property—Right of.

The Transfer of Property Act does not apply to any transfer by operation of law and therefore the implied covenant for title in S 55 (2) of that Act is not annexed to the interest of a transferee by Court sale But if the right and interest of the judgment-debtor, which is sold by action of the Court, should happen to include an interest which the transfer was capable of passing, then that interest could be purchased at the Court sale along with the property to which it was attached, and if such interest were a covenant running with the land, as, for instance, the covenant for title provided in S. 55 (2), that interest could be transferred at a Court sale.

A covenant running with the land must be one that touches or concerns the thing demised. A covenant for title does, in this sense, touch the property demised; while a covenant for indemnity is just so remote as not to touch it. A covenant of indemnity is not identical with a covenant for title

On a sale of property, the husband of the vendor executed a security bond, undertaking that, if the vendee should be deprived of any of the property purchased by him for any reason, he (the husband of the vendor) would compensate him with equivalent property Subsequently the vendee mortgaged the property purchased by him, and the same was sold in execution of a decree obtained on foot of that mortgage and was purchased by one *N,* who sold it to the plaintiff. Meanwhile, a son of the vendor obtained a decree cancelling the original sale and dispossessed *N* and the plaintiff by virtue of that decree. In a suit therefore instituted by the plaintiff to enforce the security bond against appellant, a mortgagee of the property covered by it from the husband of the vendor, *held* that the security bond was not a covenant running with the land and plaintiff had no right by virtue of its provisions to dispossess the appellant.

Appeal against the order of the Court of the Subordinate Judge of Tiruvalur, dated the 16th December, 1926, in Appeal No. 57 of 1925 (A. S. No. 38 of 1925, District Court, East Tanjore, Negapatam) preferred against the decree of the Court of the District Munsif of Nannilam in O.S. No. 528 of 1923.

C. S. Venkatachariar for *K. V. Ramachandra Aiyar* for appellant.

K. Bhashyam Aiyangar and *P. Viswanatha Aiyar* for respondent.

The Court delivered the following

Jackson, J.

JUDGMENTS:—*Jackson, J.*—Appeal against the order of the Subordinate Judge, Tiruvalur, in Appeal No. 57 of 1925 from the decree in O. S. No. 528 of 1923, District Munsif, Nannilam.

One Narayani Ammal sold certain property, described now as the A schedule property, in 1890 to one Subramania Sastri. Her husband Swaminatha Aiyar executed a security bond, Ex.

Natesa Vanniyan v. Gopalasami Mudaliar.
——
Jackson, J.

F, undertaking that if Subramania Sastri, the vendee, should be deprived of any of the property for various reasons he would compensate him with equivalent property, now described as the B schedule property. Subsequently Subramania Sastri mortgaged the A schedule property, the mortgagee sued and brought the property to sale, and it was bought in court auction by one Namasivaya Pillai who sold the property to the present plaintiff. Meanwhile Muthusawmi Aiyar, the second son of Narayani Ammal, sued to cancel the original sale, succeeded, and then dispossessed Namasivaya Pillai, and his vendee the plaintiff. The plaintiff now sues to enforce the security bond Ex. F on the ground that it is a covenant running with the A schedule land which enures to the successors to the title of Subramania Sastri. The 3rd defendant, the present appellant, is a purchaser of certain items of the B schedule property and contends that the plaintiff has no right to enforce the bond against the property in his possession. The District Munsif dismissed the suit and the Subordinate Judge finding that the bond was enforceable remanded it for disposal upon the remaining issues.

The learned District Munsif dismissed the suit on the short ground that no warranty of title could pass in a court sale, and therefore whatever rights the successors to the title of Subramania Sastri might have claimed before the mortgagee brought the property to sale, had gone when Namasivaya Pillai bought the property at that sale. This argues a certain confusion of thought.

No doubt the Transfer of Property Act does not apply to any transfer by operation of law [S. 2 (*d*)] and therefore the implied covenant for title in section 55 (2) is not annexed to the interest of transferee by Court sale. But supposing the right and interest of judgment debtor, which is sold by action of the Court should happen to include an interest which the transfer was capable of passing, then that interest could be purchased at the Court sale along with the property to which it was attached and if such interest were a covenant running with the land, as, for instance, the covenant for title provided in section 55 (2) that interest could be transferred at a Court sale. This appears to be the view taken by the learned Subordinate Judge in his sixth para, and in my opinion that view is correct.

But Mr. Venkatachariar rests his appeal upon two other grounds. He contends that the indemnity bond, in that it creates a perpetual interest in the B schedule property, is opposed to

Natesa Vanniyan v. Gopalasami Mudaliar.

Jackson, J.

section 14 of the Transfer of Property Act and he also contends that this indemnity bond is not a covenant running with the land, and therefore it could not have passed at the Court sale to plaintiff's predecessors-in-title. There appears to be much force in both of these contentions, but the first was not raised in either of the lower courts and it is unnecessary to discuss it unless the second ground proves to be invalid.

A covenant running with the land must be one that touches or concerns the thing demised. The distinction is no doubt subtle, but if this definition is kept in mind, it seems clear that a covenant for title, does, in this sense, touch the property demised, while a covenant for indemnity is just so remote as not to touch it. Shephard's Touchstone of Common Assurances puts the point as follows :

> Page 161: "And these are some of them said to be inherent, i.e., such as are conversant about the land (and knit to the estate in the land) as that the thing demised shall be quietly enjoyed........ And some of them are said to be collateral .... or not so immediately concern the thing granted; as .... to give other security to perform the covenant."

This is quoted in Cuthbert Brown's Covenants running with the land where (page 25) covenants to give security for the performance of covenants are classed as personal or collateral, *i.e.*, not such as run with the land (page 7).

To the same effect are the observations of Parke, B., in *Doughty* v. *Bowman*[1].

> "Again if the covenant declared upon presents an alternative, it is merely a covenant to indemnify. Is that then *ad idem* with a covenant for quiet enjoyment, assuming that the covenant would pass?
>
> * * * * * *
>
> It is not . . . . It must be considered as an undertaking to perform or, in default of performance, to indemnify; and therefore it cannot pass with the reversion. I think the judgment given by my brother Paterson is quite right."

"Paterson, J., had said (page 545):

> "If it be considered as a covenant of indemnity, then it is conceded that the assignee is not bound."

It may be observed that though the Transfer of Property Act mentions certain contracts the benefit of which shall be annexed to and go with the interest of the transferee, there is no such mention of a covenant of indemnity. The learned Subordinate Judge has rather assumed that a covenant of indemnity is identical with a covenant for title, but that is not so.

1. (1848) 11 Q.B. 444: 116 E.R. 543.

I find therefore that Ex. F is not a covenant running with the land and plaintiff has no rights by virtue of its provisions to dispossess the appellant.

The appeal is accordingly allowed with costs throughout to 3rd defendant. The plaintiff's suit is dismissed.

Reilly, J.

Reilly, J.—When Narayani Ammal sold the A schedule land in which she had only a daughter's estate, to Subramania Sastri, in 1890, her husband and one of her sons executed Ex. F in favour of Subramania Sastri, by which they undertook that, if Subramania Sastri was deprived of any part of the A schedule land by reason of any incumbrance, sale, security, exchange, claim for maintenance or right of a minor or by a decree of any Court or in consequence of any interest created by the executants themselves or by Narayani Ammal, or of any claim put forward by others, they would give him an equal extent of the B schedule land. That is, they agreed that if Subramania Sastri in the specified circumstances lost any part of the A schedule property, which he was buying from Narayani Ammal, they would indemnify him in a particular way. It appears to me impossible to regard that as a covenant for title in respect of the land which Narayani Ammal was selling. It has been argued before us for the plaintiff that, because a covenant for title in respect of that land would have had the result among other things that Subramania Sastri and his assignees could have sued the covenantor for damages to indemnify themselves for the loss of any part of the property through defect in Narayani Ammal's title, therefore the contract by which her husband and son promised indemnification in a particular form was a covenant for title. That argument appears to me to call for no discussion. The fact that that common feature of contracts is to be found in a covenant for title is obviously not enough to make this contract a covenant for title. A covenant to indemnify a transferee for the loss of the land transferred, even when made by the transferor, is not a covenant which runs with the land, see *Doughty* v. *Bowman*.[1] Mr. Venkatachariar for defendant 3 has argued that, even if Ex. F embodied a covenant for title, the benefit of it would not pass to the plaintiff because he is the assignee not of a purchaser from Subramania Sastri, but only of a purchaser at a court sale in execution of Subramania Sastri's right, title and interest in the A schedule property. On principle I see no reason why the benefit of an express covenant for title of which the judgment-debtor

1. (1848) 11 Q.B. 444: 116 E.R. 543.

Natesa Vanniyan v. Gopalasami Mudaliar.

Reilly, J.

can take advantage should not pass by a court sale in execution, though with respect I doubt whether in this country the benefit of an implied covenant for title arising only out of the provisions of section 55 (2) of the Transfer of Property Act could ever pass by such a sale. However it appears to me unnecessary to discuss that question as in my opinion Subramania Sastri got no covenant for title by Ex. F. I agree that the benefit of the contract under Ex. F does not run with the land and that, as it has not been assigned, the plaintiff's suit must fail.

I agree also with Mr. Venkatachariar's further contention, that, if it was intended by Ex. F to make the B schedule property permanently liable to Subramania Sastri's assignees and representatives-in-interest, it would be unenforceable as violating the rule against perpetuities. Compare *The London and South Western Railway Co.* v. *Gomm.*[2] On that ground also the plaintiff cannot enforce Ex. F.

I agree that this appeal must be allowed and the plaintiff's suit dismissed with 3rd defendant's costs throughout.

A.S.V. *Appeal allowed and suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE DEVADOSS.

Vettakke Kakkattu Manakkal Parameswaran Nambudripad and another .. *Appellants** (*Respondents* 1 *and* 6)

v.

Seshan Pattar and others .. *Respondents* (*Petr. and Respts.* 1 *and* 6).

Parameswaran Nambudripad v. Seshan Pattar.

Limitation Act (*IX of* 1908), *S.* 15—*Joint judgment-debtors—Stay of execution as against one of—Order of—Period of—Exclusion of, the computing time allowed for execution as regards others—Order permitting execution against them—Partial stay order if within section—Order adjudicating judgment-debtor insolvent—If operates as stay of execution*

Where a stay order is expressly limited only to one judgment-debtor and permits execution against other judgment-debtors, the period during which the stay order has effect cannot be excluded under S. 15 of the Limitation Act as regards execution against those other judgment-debtors in computing the period of limitation, even when the judgment-debtors are joint judgment-debtors.

Vellayyan Chetty v. *Muthayya Chetty*, (1920) 13 L. W. 59 dissented from.

---

* C. M. S. A. No. 37 of 1927. 1st February, 1928.

2. (1882) 20 Ch. D. 562.

Parameswaran Nambudripad v. Seshan Pattar.

Explanation I to Article 182 of the Limitation Act does not enable one to exclude a certain period from computation It only enables an application against one judgment-debtor to operate against others also It has nothing to do with computation. There is also no general principle in the Limitation Act that if a certain period is to be excluded as regards one judgment-debtor it should be excluded as regards other joint judgment-debtors also

Quaere : Whether a partial stay order is governed by S. 15 of the Limitation Act and whether an order adjudicating a person as an insolvent does not operate as an order staying execution of the decree against him.

Appeal against the appellate order of the District Court of South Malabar at Calicut, dated 30th November 1926, in A.S. No. 17 of 1926, preferred against the order of the Court of the Subordinate Judge of Ottapalam, dated 13th November 1925, and passed in E. P. No. 272 of 1925, in O. S. No. 476 of 1913, on the file of the Court of the District Munsif of Palghat.

The Advocate-General (*T. R. Venkatarama Sastri*) for *A. Krishnaswami Aiyar, P. S. Narayanaswami Aiyar* and *P. S. Ramachandra Aiyar* for appellants.

B. Sitarama Rao and *N. R. Sesha Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The facts of this case may be stated as follows:—In O. S. No. 476 of 1913 on the file of the District Munsif's Court of Palghat the 1st respondent obtained a decree against one Narayanan Akkitheripad who was the Karnavan of the Kakkat Mana (a Nambudri family). The decree was dated 16th March, 1914. By M. P. No. 1068 of 1914 the decree-holder applied to arrest the defendant. He was arrested on 27th July 1914, but was let off some time after, to take insolvency proceedings, on furnishing security. The judgment-debtor then filed I. P. No. 11 of 1914. He was adjudicated an insolvent on 31st August 1914. In 1916 the junior members of the defendant's family filed a suit impleading the Official Receiver for a declaration that the property in the hands of the said Narayanan belonged to the family, that the debt was his personal debt and that the family was not liable for it. That suit was filed on 18th December, 1916, in the Subordinate Judge's Court of Calicut. It was afterwards transferred to the District Court of South Malabar which gave the declarations sought by the plaintiff, one of them being "that the said properties are not liable for the debts described in the aforesaid Insolvency Petition No. 11 of 1914 as they were not contracted for tarwad necessity". This decree was dated 2nd May 1919. Meanwhile in February, 1919, the insolvent died.

Paramesvaran Nambudripad v. Seshan Pattar.

There was an appeal to the High Court (Appeal No. 353 of 1919). The High Court confirmed the decree of the Judge subject to one modification, namely, one of the declarations granted, that is the one quoted above, was deleted. The decree of the High Court was dated 7th December, 1920. On 21st August, 1922, a petition was filed for bringing his legal representative on record for purposes of execution. This was ordered without notice. On 9th February, 1923, by E. P. No. 58 of 1923, the decree-holder applied to execute the decree against the family represented by the legal representatives. The objections now taken were then also taken, but were not decided. The present petition, E. P. No. 272 of 1925, was filed on the 6th April 1925. The defendant's representatives raised the objection that the application is either incompetent or at any rate is barred by limitation. The Subordinate Judge and on appeal the District Judge overruled the defendant's objections. Hence this second appeal.

We may start with the position that the decree in O. S. No. 476 of 1913 was obtained against Narayanan in two capacities (1) personally, and (2) as manager of the family. It was as if there were two defendants in the case, the 1st defendant being Narayanan himself and the 2nd defendant being the Kakkat Mana represented by its manager Narayanan. The family was a judgment-debtor and the decree was executable against the family. But the family was not directly on the record; it was on record as represented by Narayanan. When Narayanan died in February 1919, other persons had to be brought on record to represent the family. They were so brought in August, 1922. But, except that there was a change in the person representing the family, the family was a judgment-debtor throughout. If the execution petition of 1923, E. P. No. 58 of 1923, was in time, the present petition which was filed within 3 years from it is also in time. Mr. B. Sitarama Rao, the learned vakil who appeared for the respondents and who argued the case with his usual fairness and considerable ingenuity contended that the petition of 1923 was not barred. He contended (1) that the insolvency proceedings operated as an order staying execution of the original decree in the suit of 1913 within the meaning of section 15 of the Limitation Act, and (2) that, though the stay order may be as regards one judgment-debtor only, still, for the purposes of section 15 of the Limitation Act, the period from the date of the Insolvency Petition in August

Parameswaran Nambudripad v. Sekhan Pattar.

1914, up to the death of the insolvent in February 1919, should be excluded from computation not only against the insolvent but as against the family also. He also contended that the period between 2nd May 1919, the date of the District Judge's decree in the suit of 1916 and 7th December, 1920, the date of the High Court's decree, should be excluded because during that period the District Judge's decree prevented his taking out execution. If these periods are excluded from computation the application of August 1922 was in time, being within three years from the date of the first execution petition of 27th July, 1914.

On the first point the learned Advocate-General who appeared for the appellants contended that an order adjudicating a person as an insolvent does not operate as an order staying execution of the decree against him; and he relied on *Ramaswami Pillai* v. *Govindasami Naicker*,[1] a case under the Provincial Insolvency Act (III of 1907) followed in *Sidhraj Bhojraj* v. *Alli Haji*,[2] a case under the Presidency Towns Insolvency Act (III of 1909). He contended that an order to operate as a stay order must be an order completely and not partially stopping execution of the decree, and, as the decree may be executed with the leave of the Court even after insolvency, he contended that the insolvency proceedings did not operate as a stay order within the meaning of S. 15. It may be observed that under the Act V of 1920 insolvency proceedings can operate only as a partial stay, for unless the insolvent is protected by a special order they do not operate as staying execution regarding the person, but under the Act of 1907 they did operate to stop execution against person and property except that with the leave of the Court, execution may proceed. Mr. Sitarama Rao contended that the two decisions abovementioned are wrongly decided, and he relied upon a number of decisions to show that a partial stay order may be governed by S. 15 of the Limitation Act. We think it is unnecessary to discuss this question any further, because we think the second contention of the respondent must fail and the appeal must be allowed.

The second contention of Mr. Sitarama Rao is that, where a stay order is expressly limited only to one judgment-debtor and permits execution against other judgment-debtors, still the period during which the stay order had effect must be excluded

1. (1918) I. L. R. 42 M. 319 : 36 M. L. J. 104.
2. (1922) I. L. R. 47 B. 244.

Parameswaran Nambudripad v. Seshan Pattar.

under S. 15 of the Limitation Act even as regards execution against other judgment-debtors in computing the period of limitation, when they are joint judgment-debtors. In the present case there is no doubt that Narayanan and his Mana are joint judgment-debtors. He therefore contends that though the insolvency proceedings did not stop execution against the family, and he might have taken out execution during all the time from March, 1914 up to August, 1923 without any obstacle still for the purpose of computation the period from August, 1914 to February, 1919 must be excluded. For this position he relies on the decision in *Vellayyan Chetty* v. *Muthayya Chetty*.[3] In that case the facts are that a decree was passed against several judgment-debtors. The first application was dated 16th August, 1910. As against the 1st defendant execution of the decree was suspended between 23rd August, 1910 and 10th September, 1910. There was another application for execution on 30th August, 1913 and a third application on 26th February, 1916. The question in that case was whether the last application was barred. The Subordinate Judge held that it was in time so far as the 1st defendant was concerned, but so far as the other judgment-debtors were concerned, it was barred. There was an appeal to the High Court. The respondents were not represented before the High Court—a fact noticed by the learned Judges who decided the case with this remark:

"It is unfortunate that in this case we have not the advantage of hearing any argument on behalf of the respondents."

The learned Judges held that the period between 23rd August and 10th September, 1910 should be deducted not only as against the 1st defendant but also as against other judgment-debtors. *Prima facie* this looks somewhat anomalous. The Limitation Law is primarily a law for the prevention of laches, and it looks somewhat anomalous to say that while execution can be taken out against a person throughout a certain period a part of that period should be excluded from computation simply because there is a stay order in respect of another person to which section 15 of the Limitation Act applies and which should, therefore, be excluded from computation, certainly so far as that other person is concerned. This result is arrived at by the learned Judges by reliance on Art. 182, Explanation 1 which says that in the case of joint debtors an application for execution against one may be regarded as an application

3. (1920) 13 L. W. 59.

Parameswaran Nambudripad v. Seshan Pattar.

for execution against all. If the explanation directly applies to the case then there is no question that the case is correctly decided; but the explanation does not apply to the case before us nor could it apply to the facts of *Vellayyan Chetty* v. *Muthayya Chetty*.[3] In that case the application of 30th August, 1913 was obviously barred against other judgment-debtors because it was more than 3 years from the first application dated 16th August, 1910, unless the period between 23rd August and 10th September can be excluded even as against other judgment-debtors. For the purpose of such exclusion the explanation to Art. 182 cannot help because that explanation does not enable one to exclude a certain period from computation. It only enables an application against one judgment-debtor to operate against others also. It has nothing to do with computation. But the learned Judges seem to have relied on the explanation to Art. 182 as if it was an explanation also to section 15 and to have extracted a general principle underlying the Limitation Act that if a period is to be excluded from computation as against one judgment-debtor, it should be excluded from computation as regards the other joint judgment-debtors also, as if such underlying principle was involved in the explanation. In the first place, the reasoning involved transposes the explanation to Art. 182 into a general section of the Limitation Act and certainly into an explanation to S. 15— a process which is not permissible. Secondly, it is very clear that there is no such general principle in the Limitation Act that if a certain period is to be excluded as regards one judgment-debtor it should be excluded as regards other joint judgment-debtors also. Section 21 of the Act shows that where a fresh starting period of limitation has to be used for one judgment-debtor under sections 19 and 20 the benefit of these provisions cannot be used against other judgment-debtors even though they are joint judgment-debtors, unless acknowledgment or payment is made on behalf of all by a person duly authorised for the purpose. Mr. Sitarama Rao next invoked the analogy of section 48 of the Civil Procedure Code. Here again the analogy fails him for it has been held by a bench of three Judges in *Abdul Khadir* v. *Ahammad Shaiwa Ravuthar*,[4] that for the purpose of S. 48 of the Civil Procedure Code while the period during which the decree-holder was prevented from executing the decree by the fraud of one judgment-debtor should not count against the decree-holder so far as that judgment-debtor

3. (1920) 13 L.W. 59.

4. (1913) I.L.R. 38 M. 419.

Parameswaran Nambudripad v. Sobhan Pattar.

is concerned, the benefit of the section cannot be extended as against other judgment-debtors who were not guilty of such fraud. The learned Judges relied on *Subramania Chettiar* v. *Alagappa Chettiar*[5] as an authority for their conclusion; but the decision in *Subramania Chettiar* v. *Alagappa Chettiar*[5] was simply a decision on Explanation 1 to Art. 179 corresponding to the present Art. 182. That case was certainly correctly decided. We have no doubt that if the facts are such that the explanation to Art. 182 directly applies to them, then limitation even against other judgment-debtors is saved. But in *Vellayyan Chetty* v. *Muthayya Chetty*[3] the question is not whether an application against one should be regarded as an application against all, for which position only the decision in *Subramania Chettiar* v. *Alagappa Chettiar*[5] is an authority, but whether the period which should be excluded from computation because there was a stay order against one judgment-debtor should be excluded from computation as against the other judgment-debtors even if there is no stay order against them. The decision in *Subramania Chettiar* v. *Alagappa Chettiar*[5] is no authority for such exclusion from computation and we do not think it was correctly invoked as authority by the learned Judges who decided *Vellayyan Chetty* v. *Muthayya Chettiar*[3] for their conclusion. We think that in that case the application of 30th August, 1913 was barred as against the other judgment-debtors and therefore the application of 26th February, 1916 also was barred. The case stands alone in the reports and has never been followed. We think it is incorrectly decided. It is easy to give examples of the very anomalous and startling results to which it would lead if the position in that case were accepted. The case where only one defendant appeals and others do not appeal and the decree is not executed for several years against non-appealing defendants but can afterwards be executed by reason of the appellate decree is only an apparent exception to our view, for that case is governed by Art. 182, cl. (2) of the third column, the appellate decree being the real decree that is executed for the purpose of limitation. But apart from such case which is specially provided for in the Act, all cases where the decree can be executed against one defendant but cannot be executed against another defendant have different consequences for each set of judgment-debtors. We therefore think with great deference to the learned Judges that the case in *Vellayyan Chetty* v. *Muthayya Chetty*[3] was incorrectly de-

3. (1920) 13 L.W. 59.

5. (1906) I.L.R. 30 M. 268.

Parameswaran Nambudripad v. Seshan Pattar.

cided and, if so, the application of the decree-holder in this case of February, 1923 (E. P. No. 58 of 1923) was barred by limitation and therefore the present application is also barred by limitation.

We allow the appeal and dismiss the application with costs throughout.

This decision does not preclude the petitioner from taking such steps as he is entitled to in insolvency.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

K. L. Venkataram and another .. *Appellants** (*Respondents*)

v.

N. S. Chockkier .. *Respondent* (*Petitioner*).

Venkataram v. Chockkier.

Provincial Insolvency Act (V of 1920), S. 4—Purchaser from Official Receiver of property of insolvent—Shares of sons of insolvent in property sold—Delivery of possession of—Application by purchaser for, under S. 4—Maintainability—Joint possession of insolvent's shares—Purchaser's right to get.

The Official Receiver sold properties of the insolvent, purporting to convey the whole properties and not merely the share of the insolvent. On an application made by the purchaser for delivery of possession of the properties, *held* that, in so far as the shares of the sons of the insolvent were concerned, the purchaser was not entitled to apply for delivery of possession under S. 4 of the Provincial Insolvency Act, and that his remedy was by filing a regular suit for possession in the ordinary Courts.

Held further, that the purchaser was, however, entitled to be given joint possession of the insolvent's share only.

Appeals against the orders of the District Court of Madura, dated 13th September, 1927, in C. M. A. Nos. 48, 49, 50, 69 and 70 of 1927, preferred against the orders of the Court of the Subordinate Judge of Madura, dated 14th March, 1927 and 6th April, 1927 and made in I. A. Nos. 57 of 1927, 1066 and 1060 of 1926 and I.A. Nos. 139 and 140 of 1927 (in I. P. No. 18 of 1922 on the file of the District Court, Madura).

M. Patanjali Sastri and *A. Sundaram Aiyar* for appellants.

T. M. Krishnaswami Aiyar, C. S. Rama Rao Sahib, V. S. Rangachari and *K. Krishnaswami Aiyangar* for respondents.

The judgment of the Court was delivered by

Ramesam, J. :—These Civil Miscellaneous Appeals arise out of insolvency proceedings under the Provincial Insolvency Act. Two brothers, K. L. Venkataram and K. L. Gopal, were declared insolvents and their property vested in the Official

Ramesam, J.

---

* C. M. S. A. Nos. 189 to 193 of 1927. 5th December, 1927.

Venkataram v. Chockkier.

Ramesam, J.

Receiver of Madura. The Official Receiver executed sale-deeds of separate items of their properties to various vendees who are the respondents before us. The sale-deeds purport to have conveyed the whole properties and not the shares of the insolvents themselves. The purchasers applied for delivery of possession of the properties and complained of obstruction. The obstruction was based upon a deed of trust, dated 6th January, 1926, under which the shares of the sons were settled for the conduct of a charity. Under this trust deed the insolvents themselves were appointed trustees and they objected to the taking of possession by the purchasers relying on this trust deed. It is unnecessary to consider the nature (*bona fide* or otherwise) of the trust deed. Whatever its effect may be as a deed of trust, it certainly relates to the sons' shares of the properties and the question arises whether the purchasers from the Official Receiver can obtain delivery of possession of the shares of the sons of the insolvents under S. 4 of the Provincial Insolvency Act. The petitions were originally filed under S.56 of the Act, but one of them was afterwards amended by adding S. 4 also. The District Judge considered all of them as applications under S. 4. S. 4 of the Provincial Insolvency Act corresponds to S. 7 of the Presidency Towns Insolvency Act and S. 105 (1) of the English Bankruptcy Act. It gives very wide powers to the Insolvency Court to settle questions of priority or title arising in the course of the insolvency for the purpose of doing justice to the parties and for the proper distribution of the insolvent's estate. It has been construed in *Abdul Khader* v. *The Official Assignee of Madras*[1] as giving jurisdiction to the Insolvency Court to deal with the claims of the insolvent as against properties and persons beyond the ordinary jurisdiction of the Court which has got the insolvency jurisdiction. This decision has been recently affirmed by a Full Bench decision of this Court but it is doubtful whether S. 4 covers a case of this kind that we have got before us now.

It will be convenient here to take a short survey of the decisions relating to the position of the Official Receiver in relation to the shares of the sons of the insolvent. In *The Official Assignee of Madras* v. *Ramachandra Aiyar*[2] Schwabe, C. J. and Coutts-Trotter, J. (as he then was) held that the

1. (1916) I. L. R. 40 Mad. 810.
2. (1922) I. L. R. 46 Mad. 54=43 M. L. J. 569.

interest of the sons does not vest in the Official Assignee by reason of an adjudication and that the Official Assignee as representing the managing member is entitled to joint possession along with the sons of the family property. In *Sat Narain* v. *Behari Lal*[3] the Judicial Committee also came to the same conclusion that the property of the sons does not vest in the Official Receiver by reason of the adjudication, but they observe that the Official Receiver can deal with the son's share by reason of the power of the father which may vest in the Official Receiver by reason of the insolvency. Relying on this observation of the Privy Council it was decided by a Full Bench, *Seetharama Chettiar* v. *Official Receiver, Tanjore*[4], that the Official Receiver can sell the son's share also and another Full Bench in *Basava Sankaran* v. *Anjaneyulu*[5] has held that where the Official Receiver sells the son's share at a time when there is no vesting order the purchaser can take advantage of S. 43 of the Transfer of Property Act. The law, therefore, as it now stands, shows that the Official Receiver can sell the son's share also to a stranger. The Official Receiver himself can apply under S. 4 for possession of the insolvent's share of the estate, but does it follow from these two positions that the purchaser from the Official Receiver can apply under S. 4 ? Once the Official Receiver has sold the property to a stranger and converted the insolvent's estate into money, his business is to distribute this money among the creditors and it cannot be said that delivery of possession is a necessary part in the work of distributing the assets of the insolvent among the creditors. Where a claim is made against the insolvent himself in respect of his share only or against a rival purchaser of the insolvent's property itself the matter may be different. One of the objects of the Insolvency Act is to adjudicate upon the validity of such claims. Ss. 53 and 54 of the Provincial Insolvency Act show that one of the primary duties of the Insolvency Court is to decide whether the alienations of the insolvent should be set aside as having been made in fraud of creditors or having been in fraudulent preference of one creditor against another; but where we have got to deal with the son's share the matter is entirely different and the decision in *Ex parte Anderson*[6] relied on by

3. (1924) L. R. 52 I. A. 22 = I. L. R. 6 Lah. 1 = 47 M. L. J. 857 (P. C.).
4. (1926) I. L. R. 49 Mad. 849 = 51 M. L. J. 269 (F. B.).
5. (1926) I. L. R. 50 Mad. 135 = 51 M. L. J. 529 (F. B.).
6. (1870) L. R. 5 Ch. App. 473.

Mr. Krishnaswami Aiyar, the learned vakil for the respondents, cannot, therefore, help him. On the other hand it has been held by this Court in *Official Receiver of South Arcot* v. *Perumal Pillai*[7] and *Chittammal* v. *Ponnuswami Naicker*[8] that an application of this kind is not sustainable in an Insolvency Court. Mr. Krishnaswami Aiyar, on the other hand, relies upon *Ramaswami Chettiar* v. *Ramaswami Aiyangar*[9]. That decision was before the series of cases which I referred to above and which place the position of the sons on a different footing from that of the father. In the case in *Ramaswami Chettiar* v. *Ramaswami Aiyangar*[9] the obstruction was by the sons not only in respect of their own shares but also in respect of the whole of the estate of the insolvent on the ground that the purchase was *benami* and no distinction was made between the father's share and son's share. It was really an obstruction to the Receiver taking possession of what was then considered as the insolvent's property. It was held that such a question can be considered by the Insolvency Court. But the position of the sons has been distinguished from the position of the father by the later cases and the decision in *Ramaswami Chettiar* v. *Ramaswami Aiyangar*[9] cannot be considered as covering the case of a son objecting in respect of his own share or of any objection raised by another person as guardian on behalf of a minor son or of any other person claiming any interest in respect of the son's share only.

The result is that we must hold that in so far as the sons' shares are concerned, the purchaser from the Official Receiver is not entitled to apply for delivery of possession under S. 4 of the Provincial Insolvency Act. His remedy would be by going to the ordinary Courts and by filing regular suits for possession.

Mr. Krishnaswami Aiyar pointed out that in this case one son of each of the insolvents was born after the adjudication and their interests cannot be separated from those of the father. Whether this is so or not depends upon when the vesting order was made. We have no materials here and if it is necessary the question can be gone into by the Courts below; but as the appellant has got to go to a Civil Court anyhow there is no purpose in deciding this point now.

7. (1923) 18 L. W. 884.
8. (1925) I. L. R. 49 Mad. 762 = 50 M. L. J. 180.
9. (1921) I. L. R. 45 Mad 434 = 42 M. L. J. 185.

Venkataram v. Chockkier.

Ramesam, J.

A third question was raised whether the purchaser can get joint possession of the insolvent's share. In *The Official Assignee of Madras* v. *Ramachandra Aiyar*[1] there is an observation at page 58 :

"It is no doubt true that a stranger cannot by reason of having purchased a share in the joint property insist on having joint possession."

It is not clear whether this observation was made with reference to section 4 of the Insolvency Act or with reference to the general "Hindu Law". In the present case it is not that the purchaser purchased the share of the insolvent only or of any member only but purchased the whole property. In such a case his rights are not strictly governed by mere considerations of equity. But apart from any question of procedure, he has purchased the whole interest in the property and, assuming there is no question of immorality or illegality of the debts, he is strictly entitled to the whole property. In such a case we do not see why he ought not to be given joint possession of the insolvent's share only, whatever doubts there may be as to the sons' shares. It may be that there is not much to obtain by joint possession but it makes a difference in the Court-fees which the purchaser has to pay in the regular suit he has to bring, but that at least is a substantial benefit to him.

We understand that meanwhile petitions have been filed by the Official Receiver himself for obtaining possession. Any objection to the delivery of the insolvents' shares may be considered in the disposal of those petitions and the joint possession of the insolvents' shares may be ordered after those petitions and the present petitions are all heard, should the Court think it fit to do so. In the disposal of the Civil Miscellaneous Appeals before us it is merely enough to say that the sons' shares cannot be delivered in these proceedings to the purchaser. We are not to be understood as having decided anything against the rights of the purchaser and the Official Receiver in respect of the shares of the sons who were born after the order of adjudication. We leave the point open, and merely allow an order now to be passed in respect of the joint possession dealing with the shares of the insolvents only, if the Court below thinks fit to do so after hearing all the petitions. Each party will bear their own costs. Subject to these

1. (1922) I. L. R. 46 M. 54=43 M. L. J. 569.

Venkataram v. Chockkier.

Ramesam, J.

observations, the order of remand to the Court of First Instance will stand. The petitions may be disposed of as early as possible. This order also disposes of the two Memoranda of Objections.

A. S. V. —— *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Dinavahi Venkata Hanumantha Rao.. *Appellant** (*2nd Petr.*)

v.

Yerugulapati Gangayya and others .. *Respondents* (*Respts.*).

Venkata Hanumantha Rao v. Gangayya.

Provincial Insolvency Act (*V of* 1920), *S.* 9—*Substitution of petitioner under—Effect—Petition after such substitution if a new petition or a petition with the original date—Creditor whose debt was actionable at original date of petition but became barred afterwards—Right of, to be substituted under section.*

The object of Section 9 of the Provincial Insolvency Act is to prevent other creditors from being injured by the act of one creditor who, by reason of collusion or otherwise, may not diligently prosecute the petition. On a substitution made under the section, the petition becomes the substituted creditor's petition with the original date.

Held, therefore, that, to entitle a creditor to be substituted under S. 9, it was enough if his debt was an actionable debt on the original date of the petition, and that it was immaterial that it was barred at the date of the substitution.

Appeal against the order of the District Court of Kistna in I. P. No. 19 of 1924.

N. Rama Rao for appellant.

P. Satyanarayana Rao and *A. Lakshmayya* for respondents.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J.—The facts of the case are as follows:—A creditor filed a petition for adjudicating the respondents as insolvents on 28th April, 1924. Notices were issued on the petitioners and one D. Hanumantha Rao, the appellant, was entered in the list of creditors in August, 1924. On the 5th September, 1924, it was found that the original petitioner would not proceed with his case. The pleader said to the Court that he had no instructions. On that day an order was made allowing D. Hanumantha Rao to prosecute the petition (*vide* B Diary). A later order shows that this order on 5th September, 1924, was regarded as an order substituting Hanumantha Rao for the original petitioner within the meaning of

*C. M. A. No. 190 of 1926. 7th February, 1928.

Venkata Hanumantha Rao v. Gangayya. Ramesam, J.

section 16 of the Act (*vide* Order, dated 20th April, 1925, in I.A. No. 337 of 1925). Later on the objection was taken that the appellant's debt was barred by August, 1924 or September, 1924 and as his debt was not subsisting, he cannot prosecute the petition. The District Judge allowed the objection. Hence the appeal.

The only question before us is what is meant by the words " any other creditor to whom the debtor may be indebted in the amount required by this Act". Do these words mean that the debt should be actionable on the date of substitution ? The words are copied from the English Acts of 1883 and 1914, Section 107. But the decisions in the English Courts do not help us. In *In re Maugham: Ex parte Maugham*[1] the petition was first dismissed by the Registrar and then it was reviewed by the County Court Judge on review. The learned Judge held that there was no such power of review. Cave, J., added that the power under Section 107 should not be exercised after three months. But A. L. Smith, J., made no such observation. The remark of Cave, J., was *obiter*.. In *In re Maund : Ex parte Maund*[2] the original petitionwas filed by a creditor not entitled to file it. It was not a valid petition. It was sought to be amended by the addition of other petitioners. The Court held that this could not be done. This decision does not touch the present case.

The object of the section is to prevent other creditors from being injured by the action of one creditor who, by reason of collusion or otherwise, may not diligently prosecute the petition. If it is to be regarded as a new petition, this object is frustrated and there is no purpose in having a section of the kind. If the original petition had proceeded up to adjudication or if another creditor whose debt is not barred by the date of substitution is substituted and obtained an order of adjudication, the appellant's debt which was not barred by the date of the petition could be proved. If so, we see no reason why he cannot be substituted. The words 'as petitioner' in the section show that, on a substitution, the petition becomes his petition with the original date and it is enough if the debt was an enforceable debt on the original date.

1. (1888) L.R. 21 Q.B.D. 21. 2. (1895) L.R. 1 Q. B. 194.

Venkata Hanumantha Rao v. Gangayya.

Ramesam, J.

We allow the appeal, reverse the order of the Judge and direct the petition to be restored to file for the purpose of proceeding according to law.

The respondents will pay the appellant's costs in this appeal.

A. S. V. —— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS-TROTTER, *Kt., Chief Justice,* MR. JUSTICE WALLACE AND MR. JUSTICE BEASLEY.

In the matter of N. D., a Second Grade Pleader*.

Second Grade Pleader, *In re.*

Legal Practitioners Act, Section 13 (*b*)—*Improper conduct—What amounts to.*

It is misconduct for a professional man not only to make charges against a public judicial officer which he knows to be false but charges which he must know he has no reasonable prospect of substantiating.

The High Court having on 21st March, 1927 under S. 13 (*b*) and (*f*) of the Legal Practitioners Act called upon Mr. N. D., Second Grade Pleader, Gudalur, to show cause why he should not in the circumstances stated therein be removed from the roll of pleaders or be otherwise dealt with as the High Court may think fit.

Advocate-General in support of the notice to the said Pleader.

K. S. Krishnaswami Aiyangar with *T. B. Balagopalan* for the pleader.

The judgment of the Court was delivered by

Coutts-Trotter, C. J.

Coutts-Trotter, C. J.—The pleader in this case is fortunate in that the District Judge has not actually found in terms that the story told by him is a deliberate concoction. He found that the story was extremely improbable but not demonstrated to be false. Had he so found the pleader would have been struck off for life. But what is left is very serious. Here is a professional man, whose business it is to appraise evidence, launching a grave charge against a public judicial officer on materials which he must have known to be wholly inadequate to sustain it. At the last moment under pressure from this Court he brought forward in corroboration an alleged eye-witness of the bribe taking, whose evidence is transparently false. We wish to make it clear to the profession, if it does not already realise it, that it is misconduct for a

* *In the matter of* a Second Grade Pleader, Gudalur. 1st March, 1928.

Second Grade Pleader, *In re.*

Coutts-Trotter, C. J.

professional man not only to make charges which he knows to be false but charges which he must know he has no reasonable prospect of substantiating. This pleader's sannad must be withheld till the end of 1929.

N. S. *Pleader's sannad withheld for a temporary period.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*Insolvency.*)

PRESENT :—SIR WILLIAM PHILLIPS, *Offg. Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE MADHAVAN NAIR.

F. B.

Krishna Rao, *In re.*

In the matter of Kencharla Krishna Rao .. *Insolvent.**

Presidency Towns Insolvency Act (III of 1909), S. 7—Garnishee proceedings—Garnishee living outside the jurisdiction of the High Court—Jurisdiction of High Court—Letters Patent (Madras) cl. 12—If governs cl. 18.

Section 7 of the Presidency Towns Insolvency Act confers jurisdiction on the High Court in garnishee proceedings where the garnishee lives outside its jurisdiction, and clause 18 of the Letters Patent is not governed by clause 12.

Abdul Khader v. *Official Assignee of Madras,* (1916) I. L. R. 40 Mad. 810 followed.

S. Duraiswami Aiyar with *K. S. Narayana Aiyangar* instructed by *V. Varadaraja Mudaliar* for Official Assignee.

R. N. Aingar with *O. T. Govindan Nambiar* instructed by *Messrs. King and Partridge* for garnishee.

The Court delivered the following

Phillips, O. C. J.

JUDGMENTS :—*Phillips, Offg. Chief Justice.*—This petition comes before us on a reference by Kumaraswami Sastri, J., and we are asked to determine two questions of law relating to insolvency (1) whether section 7 of the Presidency Towns Insolvency Act confers jurisdiction on the High Court in garnishee proceedings where the garnishee lives outside its jurisdiction, and (2) whether clause 18 of the Letters Patent is governed by clause 12 of the same. Both these questions were decided by a Bench of this Court in *Abdul Khader* v. *Official Assignee of Madras*[1] and it was there held that section 7 does give jurisdiction to the High Court to adjudicate on claims relating to immoveable property situated outside the limits of its ordinary original civil jurisdiction.

---

* I. P. No. 267 of 1923. 24th August, 1927.

1. (1916) I. L. R. 40 Mad. 810.

F. B.

Krishna Rao, *In re.*

Phillips, O. C. J.

The learned Judges also held that clause 12 of the Letters Patent does not control the provisions of clause 18 so as to limit the insolvency jurisdiction of the Court. The reference does not in terms question the correctness of the decision in *Abdul Khader* v. *Official Assignee of Madras*[1] but the learned Judge refers the matter on the ground that these questions are of considerable importance and are frequently arising in the Insolvency Court.

It is contended for the garnishee that the proceedings in the Insolvency Court are governed by rules relating to the ordinary original civil jurisdiction of the High Court and that, as such jurisdiction is limited by clause 12 of the Letters Patent, the same limitations must apply to insolvency matters. Section 7 of the Insolvency Act is identical with section 105 of the English Bankruptcy Act of 1914. Under that Section 105 it has been held that the Court of Bankruptcy has jurisdiction in cases of claims by a trustee against a third party and that such jurisdiction is not limited to cases in which the trustee's right is a higher one than the bankrupt's. While admitting this jurisdiction, the Courts have observed that it is a discretionary one which should not be exercised in all cases but the parties should be allowed to fight out the dispute in certain cases by an ordinary action. The question is fully dealt with by Williams in his Bankruptcy Practice, pages 392 to 395, and the principles on which the Bankruptcy Court should refuse jurisdiction are sought to be explained. In view of the fact that the same question has been dealt with fully by a Bench of this Court in *Abdul Khader* v. *Official Assignee of Madras*[1] it seems unnecessary to discuss the question at great length and I would merely express my agreement with the decision in that case and would repeat the observations of Abdul Rahim, O. C. J., that the Insolvency Court will seldom deem it expedient to try difficult questions of title. We are aware that this view of section 7 of the Insolvency Act has not been adopted in all the other High Courts of India and we understand that the question of further legislation on this point is now under consideration. Meanwhile I see no reason to differ from the previous decision of this Court so far as section 7 is concerned.

1. (1916) I. L. R 40 Mad. 819.

F. B.

Krishna Rao, *In re.*

Phillips, O. C. J.

As to whether clause 12 of the Letters Patent governs clause 18, the argument in *Abdul Khader* v. *Official Assignee of Madras*[1] is somewhat brief, but I agree that the conclusion arrived at is correct. The insolvency jurisdiction of the High Court is given by clause 18 of the Letters Patent. It has been held by the Privy Council in *In the matter of Candas Narrondas*[2] that the entering up of a judgment by the Insolvency Court is an act done in the ordinary jurisdiction of the High Court. Similarly in *Annoda Prasad Banerjea* v. *Nobo Kishore Roy*[3] Sale, J., following this case held that the High Court exercises the powers of an Insolvency Court under a special jurisdiction, but as a part of the ordinary jurisdiction vested by the law. Taking it that the jurisdiction is exercised as ordinary original jurisdiction it does not follow that clause 12 which deals with ordinary original civil jurisdiction must govern the case. It is clause 11 of the Letters Patent that gives ordinary original civil jurisdiction to the High Court and that prescribes that it shall be exercised "within such local limits as may from time to time be declared and prescribed by any law made by the Governor in Council". Clause 12 makes provision for receiving, trying and determining suits in the exercise of its ordinary original civil jurisdiction, and so far as suits are concerned the territorial jurisdiction is limited to the Town of Madras, but jurisdiction is also given in certain cases where the leave of the Court has been first obtained. So far as the Insolvency Court jurisdiction is concerned, we have to refer to clause 18, which states that the Court for relief of insolvent-debtors shall have and exercise within the Presidency of Madras such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent-debtors in India. In the first place this clause shows that the Insolvency Court exercises not only original jurisdiction but also appellate jurisdiction provided such is constituted by any law. The law which gives the Insolvency Court its jurisdiction now is the Presidency Towns Insolvency Act, III of 1909. Under section 3, the Courts having jurisdiction in insolvency under this Act shall be the High Courts of Judicature at Fort William, Madras and Bombay and in the

1. (1916) I. L. R. 40 Mad. 810. 2. (1889) I. L. R. 13 Bom. 520 at 532.
3. (1905) I. L. R. 33 Cal. 560.

F. B.
Krishna Rao, *In re.*
Phillips, O. C. J.

Act there is no limitation of the jurisdiction to the Town of Madras. Unless, therefore, clause 12 governs clause 18 such limitation cannot be upheld. It appears that the insolvency jurisdiction, although part of the ordinary original jurisdiction, is a special power relating to insolvency matters which can be distinguished from the power given under clause 12 relating to suits. On a consideration of the two clauses it will be seen that it is impossible that clause 12 can govern clause 18, for if it does, the whole of it and not merely the provision for obtaining leave of the Court in certain cases must apply. If, therefore, an insolvency matter is of a small cause nature falling within the jurisdiction of the Small Cause Court at Madras, the High Court would have no jurisdiction at all and it is not contended that such petty questions arising in insolvency should go to the Small Cause Court. Similarly when there is a provision in clause 18 that the Insolveney Court shall have such powers as are constituted by the laws relating to insolvent-debtors in India and there is no reference made to clause 12, it is difficult to hold that the clause should be read as if the words "subject to the provisions of clause 12" were inserted. Again if this were the case, the converse would equally apply and if the powers under clause 18 were restricted by the Act such restriction would be of no avail as against clause 12. It is, therefore, impossible to hold that clause 18 is governed by clause 12 and this view is further confirmed by section 90 of the Insolvency Act which runs as follows :—

"In proceedings under this Act, the Court shall have the like powers and follow the like procedure as it has and follows in the exercise of its ordinary original civil jurisdiction."

This by itself, may support the view that clause 12 is applicable, but we find the following proviso :

"Provided that nothing in this sub-section shall in any way limit the jurisdiction conferred on the Court under this Act".

This proviso clearly provides that the limitations of clause 12, if they limit the jurisdiction conferred by the Insolvency Act, do not apply.

A further contention is put forward that the words "within the Presidency of Madras" in clause 18 take away the jurisdiction of the Court to deal with persons living or property situated, outside the Presidency, but it has been held by the Privy Council in *Official Assignee, Bombay* v. *Registrar,*

Small Cause Court, Amritsar[4] that an adjudication and vesting order in Bombay had the effect of vesting all the property of the debtors, including that in the Punjab, in the Official Assignee of Bombay, and it cannot be contended that the Insolvency Court has no jurisdiction to examine witnesses outside the Presidency although it may be necessary to do so by means of a commission, and consequently the words "within the Presidency of Madras" must be deemed to limit the jurisdiction of the High Court at Madras to cases of insolvency arising within the Presidency of Madras. I must therefore hold that the Insolvency Court has jurisdiction under S. 7 of the Act and that clause 12 of the Letters Patent does not affect the provisions of clause 18. The case must, therefore, be remitted to the Insolvency Judge with a direction that he should use his discretion in determining whether the present claim, which we understand involves a very large sum of money, is one that should be tried in the Insolvency Court or whether the Official Assignee should be directed to file a suit in the ordinary course.

F. B.

Krishna Rao, *In re.*

Phillips, O. C. J.

The costs of this reference shall be costs in the cause to be provided for in the order of the Insolvency Court.

Ramesam, J.—I agree.

Madhavan Nair, J.—I agree.

N. S. *Reference No.* 1 *answered in the affirmative and No.* 2 *in the negative.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*Insolvency.*)

PRESENT:—SIR WILLIAM PHILLIPS, *Offg. Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE MADHAVAN NAIR.

In the matter of A. N. B. BALUSWAMY IYER and A. N. B. NARASIMHA IYER (*Insolvents*).

The Official Assignee of Madras .. *Applicant**

v.

A. N. Ramachandra Iyer and others .. *Respondents.*

F. B.

Official Assignee of Madras

v.

Ramachandra Iyer.

Insolvency—Hindu Law—Joint family—Father and manager of—Adjudication of, under Presidency Towns Insolvency Act—Official Assignee in whom property is vested on—Rights of, with regard to interests in joint family property of minor

---

* I. P. No 201 of 1919. 17th January, 1928.

(4) (1910) I. L. R. 37 Cal. 418=20 M. L. J. 432 (P. C.).

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

undivided sons of insolvent—Power to sell their interests for debts, neither illegal nor immoral, of the insolvent—Partition suit by sons—Filing of—Effect—Transfer of Property Act, S. 52—Suit if affected by terms or principle of—Hindu Law—Father—Sale of sons' interest in family property for discharge of proper debts—Power of severance in status between him and sons—Effect of—Official Assignee—Order vesting property in—Not equal to attachment of same.

A Hindu, who was the manager of a joint family, consisting of himself and his minor sons, was adjudicated an insolvent, and an order was made, in proceedings to which the minor sons were parties, to the effect that their interest in the joint family properties did not vest in the Official Assignee, but that the Official Assignee, who stood in the shoes of the insolvent, could alienate the minor sons' interest in the joint family properties for the purpose of paying the insolvent's debts which were not illegal or immoral. By the order the Official Assignee was empowered to take possession of the joint family properties. The question to what extent the Official Assignee should sell the interest of the minors in order to discharge their father's debts was, however, left undecided. Subsequently the minor sons of the insolvent filed a suit for partition.

Held, by the majority of the Full Bench, that the filing of the partition suit by the sons defeated the Official Assignee's power to sell their interests in the joint family properties which accrued to him by reason of the insolvency of the father.

Held, by the Officiating Chief Justice (dissenting), that the filing of the partition suit, which merely effected a division in status and left the share of each coparcener undefined, did not defeat the Official Assignee's power to sell those shares for a proper purpose, *i.e.*, for payment of the father's debts which were not illegal or immoral.

Per the majority of the Full Bench. -So far as the minor sons' shares are concerned, no interest in property is vested in the Official Assignee by the order of Court; what he gets is only a power to sell the interests of the minors in the joint family properties and that power he gets by reason of his standing in the shoes of the insolvent father. Necessarily, therefore, he gets such power subject to its inherent defect, which is, that it can be put an end to by separation in status or by a *bona fide* partition between the members of the joint family. The power vested in the Official Assignee by the order of the Court to sell the sons' interests in the joint family property cannot with regard to its quality and nature be compared to attachment of the property.

A Hindu father's right to sell his sons' share in the joint family property for an antecedent debt, which is not illegal or immoral, depends upon the property continuing to be joint ancestral property up to the date of the sale; and once there is a division in status, as by a suit for partition, the father's right to sell is at an end.

To attract the operation of S. 52 of the Transfer of Property Act there must be a pending litigation and one of the parties to the *lis* should deal with the property so as to affect the rights of the other party to the *lis*. The filing by the minor sons of a suit for partition cannot be said to be a dealing with property within the meaning of S. 52. It cannot also be said to affect the Official Assignee's right to deal with the sons' interests in the family properties within the meaning of that section. It merely affects one of the remedies open to the Official Assignee for the purpose.

Per Ramesam, J.—Quaere: Whether the pendency of an insolvency petition, by reason of which there is an undischarged insolvent, and his properties are vested in the Official Assignee so that they may be utilised for paying off the creditors, can be regarded as a pending litigation within the meaning of S. 52 of the Transfer of Property Act. *Quaere*: Whether, where the petitioner is a Hindu father, his minor sons

F. B.

Official Assignee of, Madras v. Ramachandra Iyer.

who are members of a joint family with him, can be regarded as parties to the proceeding within the meaning of that section.

Per the Officiating Chief Justice—A Hindu father's right to sell his sons' share for the discharge of an antecedent debt, which is not illegal or immoral, is extinguished by a partition effected by metes and bounds. But it is not affected by the mere filing of a partition suit by the sons, because the filing of such a suit merely effects a division in status.

Though the filing of a partition suit by the sons cannot be said to be a dealing with the property within the meaning of S 52 of the Transfer of Property Act and does not therefore come directly within the terms of that section, yet, inasmuch as it has the effect of taking away the right of one of the parties in the family property, the case falls within the principle embodied in that section, and the right of the Official Assignee to deal with the sons' interest in the family property for a proper purpose ought not to be allowed to be affected by the mere filing of such a suit.

K. S. Krishnaswami Aiyangar with *R. N. Aingar* instructed by *V. Varadaraja Mudaliar* for Official Assignee of Madras.

The Advocate-General (*T. R. Venkatarama Sastri*) instructed by *P. Tirumalachari* for respondents.

The Court delivered the following

Phillips, O. C. J.

JUDGMENTS:—*Phillips, Offg. C. J.*—This appeal was argued on the assumption that the decision in *Jagannatha Rao* v. *Viswesam*[1] was correct, but when arguments were completed judgment was reserved until the decision of the Full Bench, to which the question of the correctness of the above ruling had been referred, was available. That decision in *Subramania Aiyar* v. *Sabapathi Aiyar*[2] has now confirmed *Jagannatha Rao* v. *Viswesam*[1] and therefore the original arguments hold good.

In this case the insolvent was adjudicated on 2nd December, 1919, and a partition deed executed on 26th November, 1919 has been held to be void as against the Official Assignee. On 1st April, 1920, the Official Assignee took out a notice of motion asking that the partition deed should be declared void and for an order that the interest of the minor sons in the family property should be vested in the Official Assignee. This motion formed the subject-matter of O. S. A. No. 49 of 1921 and the judgment is reported in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3]. It was then held that the interest of the minor sons in the property did not vest in the Official Assignee but that, inasmuch as the Official Assignee stood in the shoes of the insolvent, he could alienate the minor sons' interest in the joint property for the

1. (1924) I. L. R. 47 Mad. 621 = 46 M. L. J 590.
2. (1927) I. L. R. 51 Mad. 361 = 54 M. L. J. 726 (F. B.).
3. (1922) I. L. R. 46 Mad. 54 = 43 M. L. J. 569.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Phillips, O. C. J.

purpose of paying the insolvent's debts unless the debts were incurred for illegal or immoral purposes. It was also ordered that the Official Assignee should take possession of the joint property. The question to what extent the Official Assignee could sell the interest of the minors in order to discharge their father's debts was left undecided, but his right to exercise the powers of the father was duly recognised and the minor sons were parties to the order. O. S. A. No. 49 of 1921 was presented on 21st April, 1921 and the order was passed on 1st August, 1922. Subsequently the sons filed a suit O. S. No. 157 of 1922 in the Sub-Court of Madura for partition and what we have now to decide is what effect the filing of this suit has upon the rights of the Official Assignee, the contention on the part of the minors being that the filing of the suit constituted a separation of status in the family and that therefore the father's power to sell their interests is extinguished. Mr. K. S. Krishnaswami Aiyangar for the Official Assignee contested this proposition on three grounds. He first contended that the power of sale of his sons' interest that is vested in the father under the Hindu Law arises from and is co-extensive with the sons' pious obligation to pay the father's debts. There is a great deal of force in this argument, for it has frequently been held that the father's power to sell is derived from the sons' pious obligation to pay and consequently the logical conclusion might well be that the power and the obligation are co-extensive. The question does not appear to have been discussed in any of the reported cases, but it is now I think too late to put forward such a proposition for it has frequently been taken for granted that the father's power to sell ceases as soon as the sons acquire a separate divided interest in the property. This principle was enunciated in *Krishnaswami* v. *Ramaswami*[4] where the proposition was taken for granted, it being observed that

"The father under the Hindu Law is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time the property is seized it remains the undivided estate of the father and the son. If the estate were divided the father could not sell what does not fall to him in the division."

This case was followed in *Rathna Naidu* v. *Aiyanachariar*,[5] and treated as authority for holding that where the

4. (1899) I. L. R. 22 Mad. 519=9 M. L. J. 127. 5 (1908) 18 M. L. J. 599.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Phillips, O. C. J.

estate is divided the father cannot sell what does not fall to him in the division. In *Kameswaramma* v. *Venkatasubba Rao*[6] it was held that although a Hindu son is liable for the surety debt of his father to the extent of joint family property which came to his hands at partition, yet a decree for such debt obtained against the father before partition is not executable after partition against the son and the joint family property allotted to him, the decision being put upon the ground that when execution was taken out the property had ceased to be joint family. Again in *Venkamma* v. *Srinivasa Deekshatulu*[7] Wallis, C. J., observes :

"This Court has adhered to the view of Turner, C. J. in *Ponnappa* v *Pappuvayyangar*[8] and has held in a series of cases that, as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt, it also puts an end to the creditor's right to bring the son's share to sale during his lifetime."

This case was also followed in *Venkata Reddi* v. *Sathyanarayanamurthi*[9]. In view of this long series of decisions and of the remarks in other judgments also Mr. Krishnaswami Aiyangar's contention that the father's right to sell is not extinguished by partition, at any rate when the partition has been effected by metes and bounds, cannot now be held to be correct law. It is, therefore, unnecessary to deal with the very lengthy argument addressed to us with a view to draw a distinction between an ordinary Hindu manager and a Hindu father, as upon this distinction the argument was largely based. However it is doubtful whether the power ceases until partition is actually effected as the debts can be provided for in the partition and this would have the effect of making the sons' shares liable even if this severance in status had taken place some time before. Further the sons' liability for the debts continues after partition : *Jagannatha Rao* v. *Viswesam*[1] and *Subramania Aiyar* v. *Sabapathi Aiyar*[2]; therefore the father's inability to sell their divided shares must be based on the principle that he cannot sell that in which he has no interest—vide *Krishnaswami* v. *Ramaswami*[4]. Until partition by metes and bounds is effected the father still has an interest in all the property which he can enforce by providing for

1. (1924) I. L. R. 47 Mad. 621=46 M L. J 590.
2. (1927) I. L. R. 51 Mad. 361=54 M L. J. 726 (F. B.).
4. (1899) I. L. R. 22 Mad. 519=9 M. L. J 127.
6. (1915) I. L. R. 38 Mad. 1120=27 M. L. J. 112.
7. (1918) I. L. R. 41 Mad. 136=33 M. L. J. 519.
8. (1882) I. L. R. 4 Mad. 1.
9. (1917) 40 M. L. J. 473.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Phillips, O. C. J.

the debts out of the property before dividing the balance. What then is to prevent the sale of part of the property to discharge the debt? It is suggested that in this case the payment of the father's debts can be provided for in the partition decree. This is true, and if no such provision is made the objection could be taken to the partition on the ground that it is not a *bona fide* partition. Supposing, however, that a partition were made privately and with the consent of all the members of the family and no provision was made for payment of the father's debts the consequence would be that the sons' share would be exonerated from liability, unless the creditors instituted proceedings separately against the sons. To allow such a partition would be to encourage multiplicity of litigation. In principle there can be no difference between a partition effected by decree and a partition effected by consent of parties; in either case a partition which did not provide for the payment of the father's debts would not be equitable or certainly could not be deemed to be *bona fide*. Why then should a partition be allowed until the father's debts are discharged? I would hold, therefore, that until a partition has actually been effected by metes and bounds a father's right to his sons' shares for the discharge of his debts remains unaffected.

Mr. Krishnaswami Aiyangar has put forward a further contention that, inasmuch as the right of the father to sell vested in the Official Assignee by an order of Court that order would have as much force as an attachment of the property before partition. The remarks in *Krishnaswami* v. *Ramaswami*[4] would seen to imply that if the property had been seized in execution before partition the sons' divided share would have been liable for the father's debts. It was also held in *Ramchandra* v. *Kondayya Chetty*[10] that the son is liable for family debts incurred before partition to the extent of the family property which has fallen to his share. In this case the decision in *Krishnaswami* v. *Ramaswami*[4] was distinguished on the ground that the son himself was sued by the creditor, whereas in the former case the decree was against the father alone. This principle has been upheld in *Jagannatha Rao* v. *Viswesam*[1] to which one of us was a party. The previous case-law has been elaborately discussed in that case and the

1. (1924) I. L. R 47 M. 621 = 46 M. L. J. 590.
4. (1899) I. L. R. 22 Mad. 519 = 9 M.L.J. 127.
10. (1901) I. L. R. 24 Mad. 555.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Phillips, O. C. J.

liability of the son even after partition was affirmed. From all these cases, therefore, it would appear that the pious obligation laid down upon the son to discharge his father's debts is not extinguished by a mere partition. On this analogy it is argued that the sons in this case cannot evade the liability thrown upon them by the order in *Official Assignee of Madras v. Ramachandra Aiyar*[3] by merely filing a suit for partition. Under S. 52 of the Transfer of Property Act a party cannot transfer or otherwise deal with any property directly in question in a proceeding in Court so as to affect the rights of any other party thereto under any decree or order which may be made therein. The ordinary effect of filing a suit for partition is to effect a severance in status of the family and it has been held that by the severance the right of the father to sell the son's property for his debts is taken away. It is perhaps difficult to bring the present case directly within the terms of this section and it is questionable whether the mere filing of a partition suit can be said to be dealing with the property, but even if it is not dealing with the property, it has the effect of taking away the rights of one of the parties in the family property and on the principle underlying the section it would seem that, during the prosecution of the present proceedings, the sons ought not to be allowed to plead that their own act has had the effect of diminishing the right of another party to the proceeding in contravention of an order of Court. Under the order of Court made before the partition the Official Assignee had power to deal with the sons' interests in the property for certain purposes, but if the contention put forward by the sons is upheld, that power has been taken away contrary to the order of Court by the mere act of filing a partition suit. To sanction such a proposition would be very dangerous, because in the event of the insolvency of their father the sons could always evade their liability by claiming partition before the family property is seized for the father's debts. Unless therefore it is clearly established that they have a legal right to do so, I think that the proposition ought not to be accepted. If the principle of S. 52, Transfer of Property Act, is applied, the act of the sons *pendente lite* would have no effect on orders subsequently passed in these insolvency proceedings. I would, therefore, apply this principle and hold that the partition suit

3. (1922) I. L. R. 46 Mad. 54=43 M. L. J. 569.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Phillips, O.C.J.

has not the effect of taking away the Official Assignee's rights so far as they were established by the order already passed.

The case was also put forward in another form, namely that, if it is correct to say that, when joint property has been attached before partition, such attachment, being the taking of the property into the custody of the Court, precludes the sons from denying liability, similarly, in this case, the property having been taken into the custody of the Court through its officer, the Official Assignee, before the partition was effected, the act of partition would not absolve the sons from the liability incurred under that order. If this is not the correct view the sons of an insolvent-debtor can always harass the Official Assignee in the exercise of his functions by merely filing a partition suit and causing a multiplicity of litigation.

I would, therefore, hold that in the circumstances of this case the filing of a partition suit, which merely effects a division in status and leaves the share of each coparcener undefined, would not defeat the Official Assignee's power to sell those shares for a proper purpose, *i.e.*, for payment of such of the father's debts as are not illegal or immoral. As, however, my learned brothers take a different view their view must prevail.

Ramesam, J.

Ramesam, J. :—In this case the insolvent was adjudicated on 2nd December, 1919. A partition deed had been previously executed on 26th November, 1919. On 1st April, 1920 the Official Assignee took out a notice of motion asking that the partition deed should be declared void and for an order that the interest of the minor sons in the family property should be vested in the Official Assignee. This motion formed the subject-matter of O.S.A.No. 49 of 1921 and the judgment is reported in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3]. It was then held that the partition deed was void and that the interest of the minor sons in the property did not vest in the Official Assignee, but that, inasmuch as the Official Assignee stood in the shoes of the insolvent, the insolvent's rights as managing member so far as they can be exercised for his own benefit passed to the Official Assignee, that is, he can alienate the minor sons' interests in the joint property for the purpose of paying the insolvent's debts unless they were incurred for

3 (1922) I. L. R. 46 Mad 54=43 M. L. J. 569.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

illegal or immoral purposes. The first part of the decision is in accordance with the later decision of the Privy Council in *Sat Narain* v. *Behari Lal*[11] and the second part of the decision is in accordance with the principle of law enunciated in the Full Bench decision of this Court in *Balavenkata Seetharama* v. *Official Receiver, Tanjore*[12] a decision on the Provincial Insolvency Act.

The Official Assignee then took out the present notice of motion praying (1) that it may be declared that the debts mentioned in the List A are binding upon the insolvent's sons, the garnishees herein; and (2) that the Official Assignee may be authorised to sell the interests of the minors in the joint family properties mentioned in Schedule B hereto ; and for costs and other reliefs. It is these two prayers which are the subject of the reference to the Full Bench by our brother Kumaraswami Sastriar, J. Meanwhile, the sons have filed a suit for partition at Madura impleading the Official Assignee.

I will first take up the subject of the second prayer. On this point Mr. Krishnaswami Aiyangar, the learned Counsel for the Official Assignee, stated his contention in two ways : (1) He says that the Hindu father's right to sell is based solely on the pious obligation of the son to discharge the father's debts. As this Court has held in *Jagannatha Rao* v. *Viswesam*[1] (affirmed by a Full Bench after the hearing of the case) that the son is liable in respect of his father's prepartition debts, he contends that the father's right to sell the sons' share continues even after partition. (2) Assuming that his first contention should fail, at any rate, after the right to sell passed to the Official Assignee, the right is incapable of being lost or destroyed.

So far as the first branch of the first contention of Mr. Krishnaswami Aiyangar is concerned, it seems to me that though the Hindu Law might have evolved in some other way at the present day, it is too late for the contention. It seems to me that the basis of a Hindu father's right to sell his sons' share in the joint family property for antecedent debts is twofold : (1) There must be an antecedent debt of the father which is not illegal or immoral involving a pious obligation on the part of the son to pay it ; and (2) the property must be

1. (1921) I. L. R 47 Mad. 621=46 M. L. J. 590.
11. (1924) 52 I. A. 22=I. L. R. 6 Lah. 1=47 M. L. J. 857 (P.C.).
12. (1926) I. L. R. 49 Mad. 849=51 M. L. J. 169 (F. B.).

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

joint family property of which the father was the manager. If either of these conditions is wanting the father has no right to sell. If the father's right to sell stands solely on the pious obligation of the son to pay his father's debts independently of the property being joint, then it would follow that the father would be able to sell not only the property of the son which was once joint, but which has ceased to be joint by partition, as is contended in the present case, but also the acquisition of the son by his own exertion and properties acquired by the son by inheritance from collaterals, such as maternal grandfather and others—a proposition which has never, at any time, been contended for—and the attempts that have been made on behalf of the creditors were attempts directed against the joint family property either to seize it in execution of the decree against the father alone for debts not illegal or immoral or to obtain title to it under sale or mortgage executed by the father alone for such debts ; and these rights of the creditors were upheld. As a corollary to these, the creditors also attempted to make the son liable for such debts even after partition. The attempts failed in three cases, until I and Jackson, J. decided in favour of the creditor in *Jagannatha Rao* v. *Viswesam*[1] (since affirmed by the Full Bench). But with one solitary exception it was never contended that the father could sell the self-acquired property of the son, or can sell after partition the son's property which has ceased to be joint by partition. The solitary exception which I referred to is the decision in *Rathna Naidu* v. *Aiyanachariar*[5]. In that case Mr. S. Srinivasa Aiyangar contended for the exact proposition now contended for by Mr. Krishnaswami Aiyangar. There was a mortgage by the father of the son's share after partition. The argument was that the father had such power. It was decided that he had not. The case was referred to by Wallis, C. J. and Oldfield, J., in *Kameswaramma* v. *Venkatasubba Rao*[6] in connection with the proposition that if by attachment and sale the son's share also is to pass, it should continue to be the undivided property of the father and son up to the date of attachment. In *Jagannatha Rao* v. *Viswesam*[1] I pointed out that *Rathna Naidu* v. *Aiyanachariar*[5] was a case where the father mortgaged the

1. (1924) I. L. R. 47 Mad. 621 = 46 M. L. J. 550.
5. (1908) 18 M. L. J. 599.
6. (1915) I. L. R. 38 Mad. 1120 = 27 M. L. J. 112.

son's share after partition and distinguished it on that ground by saying "obviously he has no such power". It is not, therefore, correct to say that there is no decision against the contention of the learned counsel for the Official Assignee. But apart from that judgment, the whole history of the evolution of this branch of Hindu Law shows that the Official Assignee's contention must be negatived.

The earliest decision establishing the father's right to sell the son's share in the ancestral property for antecedent debts not illegal and immoral is the decision of the Privy Council in *Muddun Thakore* v. *Kantoo*[13]. Their Lordships first put the question :

> "Could the son have said that because this was ancestral property which descended to his father from his grandfather, it was not liable at all to pay his father's debts?"

They then quote a passage from Lord Justice Knight Bruce's judgment in *Hunooman Pershad Pandey* v. *Mt. Babooee Munraj Kunwari*[14], which has now become classic, and proceed :

> "That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. . . It being a pious duty to pay his father's debts ; the ancestral property, in which the son as the son of his father acquires an interest by birth is liable to pay the father's debts."

Seeing that the case in *Hunooman Pershad Pandey* v. *Mt. Babooee Munraj Kunwari*[14] is a case of guardian and manager of an infant heir, it is clear that the right to sell was based on the father's right of managership. Then we come to the decision of the Calcutta High Court in *Sheo Pershad Singh* v. *Mt. Soorajbansee Kooer*[15], following the *Muddun Thakore's* case. In the same year we have the decision of Turner, O. C. J. and Oldfield, J., in *Barkatullah Khan* v. *Rennie*[16], where Oldfield, J., said :

> "The father by reason of his paternal relation and his position as head of the family and its manager is entitled to make a lawful disposition of the property in the interest of the family."

This decision expressly lays down that the basis of the father's right to sell consists of two grounds which I have set forth above, namely, managership and antecedent debt. We

13. (1873) 1 I. A. 321 = 14 Beng. L. R. 187 (P.C.).
14. (1856) 6 M. I. A. 421.
15. (1875) 24 W. R. 181.
16. (1875) I. L. R. 1 All. 17.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

have next the Privy Council decision in *Suraj Bansi* v. *Sheo Pershad*[17], affirming the decision of the Calcutta High Court in *Sheo Pershad* v. *Mt. Soorajbansee Kooer*[15]. At page 165 it was pointed out that

"The rights of the coparceners in an undivided Hindu family governed by the law of the Mitakshara, which consists of a father and his sons, do not differ from those of the coparceners in a like family which consists of undivided brothers, except so far as they are affected by the peculiar obligation of paying their father's debts which the Hindu Law imposes upon sons and the fact that the father is in all cases naturally, and, in the case of infant sons, necessarily, the manager of the joint family estate, etc."

After referring at page 169 to Westropp, C. J.'s judgment in regard to the whole of the family undivided estate, they refer at page 170 to the decision in the *Muddun Thakore's* case and say :

"It treats the obligation of a son to pay his father's debts, unless contracted for an immoral purpose, as affording of itself a sufficient answer to a suit brought by a son either to impeach sales by private contract for the purpose of raising money in order to satisfy pre existing debts. . ."

In *Ponnappa* v. *Pappuvayyangar*[8] Turner, C. J., summing up the effect of the prior decisions at page 63, says :

"An alienation of ancestral estate by a father to discharge a judgment debt not contracted for an immoral purpose cannot be disputed by a son"

and at page 64 he says :

"Where there is an heritage and the son has taken an interest in the heritage, he thereby assumes an obligation which is not of a purely personal character, but an obligation incidental to his interest in the heritage. The observation of Lord Justice Knight Bruce in *Hunooman Pershad Panday's* case and of Sir Barnes Peacock in *Girdharee Lall's* case point with sufficient clearness the obligation as an incident of the heritage."

In *Namoni* v. *Modhun Mohun*[18] Lord Hobhouse observed at page 35 :

"Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt."

In the judgment of the High Court quoted at page 27 it was observed referring to the father,

"The manager was the only ostensible owner representing the family to the world at large............when joint ancestral property has passed out of a family either by a conveyance executed by a father in consideration of an antecedent debt ....the sons cannot dispute it".

8. (1882) I. L. R. 4 Mad. 1.

15. (1875) 24 W. R. 281.

17. (1881) I. L. R. 5 Cal 148=6 I. A. 88 (P.C.).

18. (1886) 13 I.A. 1=I. L. R. 13 Cal. 21 (P.C.).

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

At page 32 Lord Hobhouse says :

"The father's position in his capacity of representative of the estate must be put on a level, as regards execution for debts due from the family, with that of a widow representing the family estate."

In *Krishnaswami* v. *Ramaswami*[4] it was observed :

"This necessarily implies that at the time the property was seized it remained the undivided estate of the father and the son. If the estate were divided the father could not sell what does not fall to him in the division."

The word "seized" here refers to seizing in execution which corresponds to the father's selling the son's estate in the case of a private sale, so that up to the date of attachment in the case of execution and up to the date of sale in the case of private sale by the father, the property must continue to be joint if the father's right to sell is to be subsisting.

It is not necessary to refer at great length to the decisions in *Kuppanna Goundan* v. *Kumara Goundan*[19] and *Kameswaramma* v. *Venkatasubba Rao*[6] which relies on the former the case in *Venkanna* v. *Srinivasa Deekshatulu*[7] and that in *Venkata Reddi* v. *Sathyanarayanamurthi*[9] which are all dealt with by me fully in *Jagannatha Rao* v. *Viswesam*[1]. All these decisions necessarily imply that the right of the father to sell was dependent on the property continuing to be joint ancestral property up to the date of the sale. In Mayne's Hindu Law, 9th Edition, the proposition is thus stated at page 411, section 307 (*a*) :

"Where the son is joined in a suit against the father, this is for the purpose of enabling the Court to exercise the power of the father to sell family property in discharge of his debts, not being illegal or immoral. . . . After partition, of course, the son holds the share which is allotted to him free from any such liability. . . ."

In *Sahu Ramchandra* v. *Bhup Singh*[20], a decision which gave rise to some conflict of opinion as to the nature of the antecedent debt ultimately set at rest in *Brij Narain* v. *Mangal Prasad*[21], but which on this point is authoritative, Lord Shaw of Dumferline observed at page 443 :

"The law of the Mitakshara has, however, given to the father in his capacity of manager and head of the family certain powers with reference to the joint family property. The general principle in regard to that matter is that he is at

1. (1924) I. L. R. 47 Mad. 621=46 M. L. J. 590.
4. (1899) I. L. R. 22 Mad. 519=9 M. L. J. 127.
6. (1915) I. L. R. 38 Mad. 1120=27 M. L. J. 112.
7. (1918) I. L. R. 41 Mad. 136=33 M. L. J. 519. 9. (1917) 40 M. L. J. 173.
19. (1910) I. L. R. 34 M 450=20 M. L. J 961.
20. (1917) 44 I. A. 126=I. L. R. 39 All 437=33 M. L. J. 14 (P.C.).
21. (1923) 51 I. A. 129=I. L. R. 46 A. 95 (P.C.).

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

liberty to effect or to dispose of the joint property in respect of purposes denominated necessary purposes."

At page 446 his Lordship said :

" A perusal of the numerous authorities will show that where a joint family property has been sold out and out. . these rights are not to be defeated."

At page 444 again his Lordship observed :

" Responsibility to meet the father's debts is one thing and the validity of a mortgage over the joint estate is quite another thing."

Mr. Krishnaswami Aiyangar contended that, if it were true that the father's managership is also a necessary element as the basis of the father's right to sell, a junior member of a Hindu joint family who is however a father cannot sell the share in the property which belongs to his branch consisting of himself and his sons, for, *ex hypothesi*, he is not the manager. The answer to this contention is that he is the sub-manager of the branch consisting of himself and his sons. To enable him to be a manager it is unnecessary that he should have possession of any part of the family which *ex hypothesi* is with the main manager. That he is a manager is clear from the fact that he could be sued by creditors for debts whether incurred by himself only, not illegal or immoral, or for the benefit of his branch so as to bind his own branch. He can sue for a division of the share of his branch and he can sell the share of his branch for antecedent debts not illegal or immoral. All these are acts of managership, and where he expressly abandons managership he cannot do these things. It is because he is the manager he can represent his sons in the various acts just enumerated. I am, therefore, of opinion that the first contention for the Official Assignee fails ; and once there is a division in status as by a suit for partition, the father's right to sell is at an end. This is also the view taken not only by the dissenting Judges (my Lord Chief Justice and Srinivasa Aiyangar, J.) but also by Jackson and Anantakrishna Aiyar, JJ. and is also implied in the judgment of Waller, J. who says that the partition should provide for the discharge of debts out of the joint property.

I now proceed to consider the second contention for the Official Assignee, namely, that once the power passed to the Official Assignee, it is incapable of being lost. On this matter it is first suggested that the son's partition suit is affected by some *lis pendens* or some kind of *res judicata* by reason of the

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

order in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3]. For the purpose of dealing with this contention we must first see what the order of the appellate court in that appeal is. Schwabe, C.J., there held that the Official Assignee was entitled to joint possession along with the sons and that the power of the father passed to the Official Assignee. He then observed :

"I expressly refrain from deciding anything as to what the respective rights of the parties will be hereafter. It is for the Official Assignee to decide after examining the nature of the debts whether he can exercise the insolvent's right, as managing member. of selling the assets for the benefit of the creditors. . ."

It seems to me that what the Bench was deciding in that case was the right as it stood at the time of the judgment. This is clear from the use of the word "hereafter". That the Official Assignee had power to sell at the time cannot be denied, but it cannot be said that that decision meant to decide that the Official Assignee's power will continue even after partition, a question to which their Lordships did not address themselves. On the other hand they expressly abstained from expressing any opinion on the changes of rights that might occur thereafter. Again it cannot be said that their Lordships expressed an opinion or passed a decision to the effect that the power is a power incapable of being destroyed, once it vested in the Official Assignee. I am, therefore, unable to say that the son's action tries to achieve something which has been already adjudicated in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3]. Again it cannot be said that there is any *lis pendens* in the case. It is true that insolvency proceedings are pending in the High Court, but to attract the operation of S. 52 of the Transfer of Property Act there must be a pending litigation and one of the parties to the *lis* should deal with the property so as to affect the other party to the *lis*. In the first place I doubt if there is any pending litigation to which the sons are parties. I doubt if the pendency of an insolvency petition, by reason of which there is an undischarged insolvent, and his properties are vested in the Official Assignee so that they may be utilised for paying off the creditors, can be regarded as a pending litigation. Assuming that it is one, I do not see how the sons can be regarded as parties to it. It is true that at one time there was a question between the sons and the Official Assignee as to the *bona fides* of a partition

---

3. (1922) I. L. R. 46 Mad. 54=43 M. L. J. 569.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

deed. That question was finally decided by the High Court in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3]. After that decision, and up to now, there has been no litigation between the Official Assignee and the sons. Secondly, there is no dealing with the property by the sons in this case. The sons filed a suit for partition. It cannot be said that the mere filing of the suit for partition is improper dealing. The Official Assignee and the sons get joint possession by reason of the decree in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3]. I do not think it can be said that their Lordships meant or intended that the joint possession should continue until the Official Assignee effects sales. But Schwabe, C. J., by saying that it was for the Official Assignee to decide whether he could exercise the father's right, meant no such thing. Where there is an inconvenient situation like joint possession between private merchants at Madura and the Official Assignee at Madras, a suit for partition, which will put an end to such a position, is the proper thing to do. A private partition with improper allotments of shares is, of course, *mala fide* and stands on a different footing. Anyhow there is no dealing with property. Thirdly, the action of the sons cannot be said to affect the Official Assignee's right. If the suit for partition ends in the evasion of the son's liability for pre-partition debts, then, of course, it does affect and it is dangerous to allow such a result. But all that is contended for the respondent is not that the substantial right of the Official Assignee to proceed against the sons for the father's debts is lost, but only one of the several remedies open has been extinguished. Now the Official Assignee has got several remedies against the sons: first, as representing creditors, or associating himself with them, he can file suits against the sons, obtain decrees and sell the sons' share also; and secondly, in the partition suit now pending at Madura, wherever it may be tried ultimately, at Madura or Madras, he can apply for the creditors to be made parties, so that the findings as to the nature of the debts may bind all and ask for a decree providing for the payment of such debts as are not illegal or immoral (see *Venku Reddi* v. *Venku Reddi*[22]). There is possibly a third remedy open. We have held in the connected Full Bench decision that, in garnishee

3 (1922) I. L. R. 46 Mad. 54 = 43 M. L. J. 569.

22. (1926) I. L. R. 50 Mad. 535 = 52 M.L.J. 387 (F.B.).

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

proceedings, a question can be decided by the Insolvency Judge if necessary. This power is subject only to his discretion, but he is not bound to go into all questions that arise before him. In the present case the Judge sitting in insolvency may, if he thinks proper, decide the questions raised by the Official Assignee as between himself and the sons, provided the sons fill the character of the garnishee. These are matters for him to determine. The Official Assignee can then obtain formal decrees. The only remedy lost to the Official Assignee is the right of selling the sons' share by private sale. This is merely a processual right. The substantial right of the Official Assignee to enforce the debts due to the creditors against the sons remains by reason of our decision in *Jagannatha Rao* v. *Viswesam*[1]. One mode of enforcing it, a right which is merely ancillary and auxiliary to the main right, out of several modes, is all that is lost. Seeing that the right to partition is an unimpeachable right which every member of a joint tenancy or a tenancy-in-common possesses (see *Girja Bai* v. *Sadashiv Dhundiraj*[23]) ; and it is even proper where the Official Assignee at Madras and some merchants at Madura are in joint possession, it cannot be said that it is an undesirable consequence as the result of a partition suit, namely, putting an end to the right of private sale, seeing that the liability of the sons for the debts remains and can be enforced by other methods. I regret I have to differ from my Lord on this part of the case.

The second ground on which the point has been argued is that, after passing to the Official Assignee, the power becomes incapable of being destroyed and Mr. Krishnaswami Aiyangar compares this to the case of an attachment of the property in the hands of the father in execution of a money decree. As I think there is no analogy between the two and as it is necessary to see the real consequence of the attachment of joint family property, I proceed to consider the matter at some length. Where a creditor obtains a personal decree against the member of a Hindu family, who is not a manager or father, but is only a junior member without sons, and proceeds to attach his share of the family property, and if he afterwards dies, the attached property may be sold in spite of his death. But if there is no attachment before the death, his share of

1. (1924) I. L. R. 47 Mad. 621 = 46 M.L.J. 590.

23. (1916) 43 I. A. 151 = I. L. R. 43 Cal. 1031 at 1048 = 31 M.L.J. 455 (P.C.).

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

the property cannot be sold because his property has survived to the rest of the family who are not parties to the decree. But if the creditor obtained a money-decree against the manager of the whole family or against a member who has sons and the judgment-debtor dies before the decree-holder attaches his property, the decree can be executed against the rest of the family or the sons as the case may be. In the first case they are represented by the original defendant in the suit and in that sense were parties to it, and there is no question of the property surviving to persons who are not parties to the suit so as to escape execution. In the second case the sons can be brought in as legal representatives under Section 53 of the Civil Procedure Code. Except in these two cases, attachment of the property before the death of the judgment-debtor is merely to prevent the operation of survivorship and to enable the execution to proceed (*vide* Mayne's Hindu Law, Sections 330-2). The essence of the attachment is to earmark the property as the property of the judgment-debtor for the purposes of execution. These characteristics of an attachment cannot apply to a bare power to sell which cannot be attached and so earmarked and cannot be said to survive to other members of the family. Again, when we remember that the power passes to the Official Assignee by reason of his "standing in the shoes of the father" as Schwabe, C. J., pointed out, it is opposed to all illegal conception to say that it becomes a larger power in the hands of the Official Assignee. The power when it comes into existence is a power which has a *terminus ad qum*, namely, the date of separation in status. All the time the power exists it has inherently by its very nature the quality of being extinguished by separation in status or a *bona fide* allotment of shares. How can such a quality be taken away from it simply because the power passes from the father to the Official Assignee. We are not here dealing with the case of an interest being vested in the Official Assignee and then being divested away from him. When it is said that the power in the Official Assignee is extinguished by reason of partition it is not suggested that the power is taken away from him and vested again in some other person, but it is extinguished by an event which had always the property of so extinguishing it. In *Sheobaran Singh* v. *Mt. Kulsum-un-nissa*,[24] dealing with a case of

24. (1927) 54 I. A. 204 = I. L. R. 49 All. 367 = 52 M. L. J. 658 (P. C.).

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Ramesam, J.

insolvency where the actual right was the right of pre-emption, Viscount Dunedin observed :

"It seems to their Lordships that this overlooks one of the fundamental principles of all arrangements for the realisation and distribution of a bankrupt's property. In every system of law the term may vary, but in all there is an official, be he called an assignee or trustee or any other name, and that official is by force of the statute invested in the bankrupt's property. But the property he takes is the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens."

Though by reason of the decision of the Privy Council in *Sat Narain* v. *Behari Lal*[11] the actual share of the sons does not vest in the Official Assignee the property of the father and his power certainly pass, but they pass on the principle of the above decision exactly as they stood in the hands of the father with all the advantages and all the burdens. One of the disabilities attached to the power is that it is extinguished on a division in status. To say that it continues in the hands of the Official Assignee after division is not to say that he gets it exactly as it stood in the father's hands. For these reasons I am of opinion that the power as passed to the Official Assignee cannot enlarge the nature of the power and add to it qualities which it did not possess before. All the other remedies open to the Official Assignee, whatever they are, continue as before. The sons' liabilities continue as before and they can be worked out by suitable proceedings but not by private powers of sale. It seems to me, that, to accept the contention of the Official Assignee is to hold that their Lordships of the Judicial Committee, in deciding *Sat Narain* v. *Behari Lal*[11] were wisely making a distinction without a difference and evidently to get round that decision. If it is desired to avoid the consequences of that decision, legislation is the only remedy.

As to the final prayer, I have already indicated above my views about it. If the Judge sitting in insolvency thinks it serves any purpose that he should enquire into the binding nature of the debts so far as the sons are concerned and make a declaration on it he may do so, provided the sons fill the character of garnishees or he may leave it to the original suit when the matter is bound to be enquired into: *Venku Reddi* v. *Venku Reddi*[12]. These are my answers to the questions referred to the Full Bench.

11. (1924) 52 I. A. 22 = I. L. R. 6 Lah. 1 = 47 M. L. J. 857 (P.C.).
12. (1926) I. L. R. 50 Mad. 535 = 52 M. L. J. 387 (F.B.).

F. B.
Official Assignee of Madras v. Ramachandra Iyer.
Madhavan Nair, J.

Madhavan Nair, J.—I have had the advantage of reading the judgments of my Lord the Officiating Chief Justice and of Mr. Ramesam, J. As the facts are fully stated in those judgments, it is not necessary to re-state them. The facts show that after the adjudication of the father as an insolvent and the vesting of his rights in the Official Assignee the minor sons of the insolvent instituted a suit in Madura for partition of the joint family properties. The Official Assignee now seeks to sell privately the interests of the sons in those properties. The minors argue that the institution of the partition suit effects a severance of the joint family status and, therefore, the father's right to sell the sons' interests in the joint family property has been extinguished and consequently the power of the Official Assignee who steps into the shoes of the father is also extinguished. This argument is met by the counsel for the Official Assignee in two ways: (1) Since the power of the father to sell the sons' interests for his antecedent debts not illegal or immoral is based on the doctrine of pious obligation, logically speaking, the operation of the principle cannot be affected by the severance of the joint family status between the members of the family; consequently, despite the suit instituted by the minors, the Official Assignee representing the father can effect a sale of the sons' interests in the joint family properties. I am willing to admit that the argument is not without force, but the weight of the case-law is overwhelmingly against the contention. My learned brother, Ramesam, J., has referred to all the well-known cases which establish the father's right to sell the sons' share in the ancestral property for an antecedent debt not illegal or immoral starting from the earliest Privy Council decision in *Girdharee* v. *Kantoo*[13]. These decisions show that, to enable the father to sell the sons' share in the joint family property for an antecedent debt not illegal or immoral, the property must be family property of which the father is the manager. Though the father under the Hindu Law is entitled to sell the entire ancestral estate to discharge his antecedent debt which is neither illegal nor immoral, it has been held that, if the estate is divided, the father could not sell what does not fall to him in division (see *Krishnaswami* v. *Ramaswami*[4]). This case has been followed in *Rathna Naidu*

4. (1899) I. L. R. 22 Mad. 519=9 M. L. J. 127.
13. (1873) 1 I. A. 321=14 Beng. L. R. 187 (P. C.).

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Madhavan Nair, J.

v. *Aiyanachariar*[5], where the very contention now put forward by Mr. K. S. Krishnaswami Aiyangar was overruled. The decisions in *Kameswaramma* v. *Venkatasubba Rao*[6], *Venkanna* v. *Srinivasa Deekshatulu*[7] and *Venkata Reddi* v. *Sathyanarayanamurthi*[9] are all decisions of this Court against the view contended for on behalf of the Official Assignee. I do not discuss those decisions as I cannot usefully add anything about them to what is contained in the two judgments just now delivered. I agree that the first argument should be overruled.

The second argument that is advanced on behalf of the Official Assignee is that, since the power to sell came to be vested in the Official Assignee by an order of Court, that power can be exercised by him unaffected by the change in the relationship of the parties introduced by the partition suit instituted by the minors. The order giving the Official Assignee power to sell was passed by this Court in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3]. At one stage of the argument Mr. Krishnaswami Aiyangar suggested that the order would have the force of *res judicata* so far as the minors are concerned as they were also parties to that order; but he did not press the point as it is clear that the order does not constitute any bar by *res judicata*. Though the order in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3] stated that the power of the father passed to the Official Assignee, the Court refrained from deciding anything as to what the respective rights of the parties will be hereafter and stated that it was for the Official Assignee to decide whether he could exercise the father's right. This clearly shows that the order did not decide whether Official Assignee's power to sell will continue even after the partition which is the question we are called upon to decide. Only the respective rights of the parties as they stood at the time were decided by that order. It cannot obviously have the force of *res judicata*.

It is then argued that the minor's partition suit is affected by the doctrine of *lis pendens*. It is difficult to see how the doctrine can be made to apply to the facts of the present case. Under S. 52 of the Transfer of Property Act, a party to a

3. (1922) I. L. R. 46 Mad. 54=43 M. L. J. 569.
5. (1908) 18 M. L. J. 599.
6. (1915) I. L. R. 38 Mad. 1120=27 M.L. J. 112.
7. (1918) I. L. R. 41 Mad. 136=33 M. L. J. 519.
9. (1917) 40 M. L. J. 473.

F. B.
Official Assignee of Madras
v.
Ramachandra Iyer.
Madhavan Nair, J.

pending litigation cannot deal with the property involved in the litigation to the detriment of the other party's rights under any decree or order that may be made therein except under the authority of the Court. Assuming that insolvency proceedings are pending in the High Court, to make the section applicable there must be a dealing with the property by one of the parties. It cannot be said that the filing of the suit for partition by the sons amounts to a dealing with the property. The argument that, since the institution of the partition suit effects a severance of joint family status, the right of one of the parties in the family properties is taken away by the minors' suit during the pendency of the insolvency proceedings cannot also be accepted. It is true that under the order in *Official Assignee of Madras* v. *Ramachandra Aiyar*[3], the Official Assignee has the power to deal with the sons' interests in the family properties in certain circumstances, but the suit for partition does not put an end to that right. The sons, by instituting the suit for partition, are only exercising their legitimate right. By exercising the privilege which the law allows them, the right of the Official Assignee to proceed against the sons' interests in the joint family property is not put an end to. As Ramesam, J., points out in his judgment, only one of the remedies open to the Official Assignee is extinguished by the exercise of this right. He cannot any longer sell the joint family properties by private sale; that is all; all the other remedies for enforcing the right of the creditors are still open to him. He can institute suits against the sons and enforce the decrees in such suits by selling the sons' interest.

The right of the Official Assignee to institute suits for realising debts due to the creditors is preserved to him by the decision in *Jagannatha Rao* v. *Viswesam*[1]. The correctness of the decision is not challenged before us. It has been affirmed by the decision of the Full Bench in *Subramania Aiyar* v. *Sabapathi Aiyar*[2]. Again, in the suit now filed by the sons, the Official Assignee and the creditors may apply to be made parties and by proper procedure can obtain decrees which they can execute against the sons' interests.

Lastly it is argued that the power to sell the sons' interests, which vested in the Official Assignee by the order of

1. (1924) I. L. R. 47 Mad. 621 = 46 M. L. J. 590.
2. (1927) I. L. R. 51 Mad. 361 = 54 M. L. J. 726 (F. B.).
3. (1922) I. L. R. 46 Mad. 54 = 43 M. L. J. 569.

F. B.

Official Assignee of Madras v. Ramachandra Iyer.

Madhavan Nair, J.

Court, has the same force as attachment of the property before partition and that it cannot be extinguished by the institution of the partition suit. It seems to me that the power vested in the Official Assignee by the order of the Court to sell the sons' interests in the joint family property cannot, with regard to its quality and nature, be compared to attachment of the property. It is clear that, so far as the minors' shares are concerned, no interest in property is vested in the Official Assignee by the order of Court, *Sat Narain* v. *Behari Lal*[11]; what he gets is only a power to sell the interests of the minors in the joint family properties and this power he gets by reason of his standing in the shoes of the insolvent father. Necessarily, therefore, he gets such power subject to its inherent defect, which is, that it can be put an end to by separation in status or by a *bona fide* partition between the members of the joint family. As pointed out by Lord Dunedin in *Sheobaran Singh* v. *Mt. Kulsum-un-nissa*[24], with referenee to the right of pre-emption in a case of insolvency,

"The property he (the Official Assignee) takes is the property of the bankrupt exactly as it stood in his person with all its advantages and burdens."

The same may be said of the power to sell the sons' interests in the joint family property that passes to the Official Assignee by virtue of the insolvency of the father. The Official Assignee gets the power with all its advantages and burdens. One of the burdens or defects, as I have already pointed out, is that it can be extinguished by separation in status of the members of the joint family. It, therefore, follows that by force of the suit for partition instituted by the minors the Official Assignee in this case loses his power to sell the joint family properties by private sale. On this argument I respectfully agree with the opinion of Ramesam, J.

In the result I would hold that the filing of a partition suit by the sons would defeat the Official Assignee's power to sell the sons' interests in the joint family properties which accrued to him by reason of the insolvency of the father.

A. S. V. *Order accordingly.*

---

11. (1924) 52 I. A. 22 = I. L. R. 6 Lah 1 = 47 M. L. J. 857 (P. C.).
24. (1927) 54 I. A. 204 = I. L. R. 49 All. 367 = 52 M. L. J. 658 (P.C.).

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—LORD PHILLIMORE, LORD CARSON AND SIR LANCELOT SANDERSON.

Sakalaguna Nayudu and another .. *Appellants** (*Defts.*)

v.

Chinna Munuswami Nayakar .. *Respondent* (*Plff.*).

P. C.

Sakalaguna Nayudu *v.* Munuswami Nayakar.

Sale deed—Agreement by vendee to reconvey—Option exerciseable by vendor or his heirs or assigns—Death of vendor—Assignment of benefit of contract by vendor's son in favour of stranger—Assignee's suit for specific performance—"Standing offer" or "completed contract."

On the 27th January, 1891 one Venkata Subramania Aiyar (hereinafter called the vendor), on behalf of himself and his son Krishnasami Aiyar (then a minor), sold the village of Siyatti, being the property in suit, to one Venkatapathi Naidu (hereinafter called the vendee) for a consideration of Rs. 10,000. On the same day the vendee executed a registered 'counter-part document', by which he agreed to reconvey the village for the same consideration of Rs. 10,000 if the vendor made an application for that purpose in the month of *Ani* thirty years later. The material terms of the 'counterpart document' were as follows:—

"As I have this day purchased absolutely for Rs. 10,000 the entire village of Siyatti which belongs to you, I shall again convey to you the said village after a period of thirty years from this date, *i e.,* in the *Ani* cultivation season of the thirtieth year in case you wish to have the village again, and on your paying the said sum of Rs. 10,000 to me."

With regard to this document, the Privy Council concurred with the High Court in holding that although the name of the vendor's son was not mentioned in it, it must be treated as having been executed by the vendee in favour of the vendor and his son, inasmuch as "the deed of sale was executed by the vendor on behalf of his minor son as well as on his own behalf, and the counterpart document was obviously intended to give the right to call for a reconveyance of the property to the persons who were parties to the deed of sale."

The vendor died in 1899, leaving Krishnasami Aiyar, his only son, surviving him. By a deed, dated the 12th May, 1910, Krishnasami Aiyar sold the said village of Siyatti to the plaintiff, and also executed an assignment in plaintiff's favour of his right to the benefit of the 'counterpart document.'

The vendee died in or about the year 1919, and the defendants were his sons and heirs.

The month of *Ani* in the 30th year from the date of the 'counterpart document' corresponded to the 14th June to 14th July, 1920, and the plaintiff on the 29th June, 1920 intimated to the defendants (sons of the deceased vendee) that as assignee from Krishnasami Aiyar (the vendor's son) he was entitled to the reconveyance of the property in suit, at the

---

*P.C. Appeal No. 53 of 1926. 24th April, 1928.

same time tendering the stipulated sum of Rs. 10,000. On defendants refusing to receive the money, the plaintiff filed the present suit for specific performance of the 'counterpart document.'

It was not a case of a mere "standing offer" by the vendee; on the contrary, there was on the 27th January, 1891 a completed contract between the vendee of the one part and the vendor and his son of the other part, by which the vendee undertook for consideration to reconvey the property if the other parties to the contract (viz, the vendor and his son) offered to purchase the same at the time stated and for the amount mentioned in the "counterpart document," and the benefit of the contract aforesaid could be validly and effectually assigned even to a stranger such as the plaintiff.

Their Lordships repelled the contention that the option created by the "counterpart document" could be exercised only by the vendor and his son personally. Taking the terms of the contract and the surrounding circumstances into consideration, they held that the option could be exercised by the above-mentioned two persons or by their heirs or assigns.

Appeal No. 53 of 1926 from a judgment and decree, dated the 5th March, 1925, of the High Court, Madras (Spencer and Ramesam, JJ.), reversing a judgment and decree, dated the 26th June, 1922, of the Subordinate Judge of Chingleput.

The material facts of the case appear from their Lordships' judgment. The case in the Court below will be found reported in I.L.R. 49 Mad. 387; 51 M.L.J. 229; 100 I.C. 399.

Dunne, K.C., Narasimham and *Subba Row* for appellants.

De Gruyther, K.C. and *Abdul Majid* for respondent.

24th April, 1928. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON:—This is an appeal by the defendants in the suit against a decree dated the 5th March, 1925, of the High Court of Judicature at Madras, which reversed a decree dated the 26th June, 1922, of the Subordinate Judge of Chingleput.

The suit was brought by the plaintiff in order to obtain a direction by the Court that the defendants should execute a conveyance of the property in suit in favour of the plaintiff and other consequent reliefs.

The learned Subordinate Judge dismissed the suit with costs; the High Court allowed the plaintiff's appeal with costs and ordered the defendants to execute the conveyance in favour of the plaintiff as prayed, and gave other necessary directions in respect thereof.

The material facts of this case are as follows:—The defendants are the sons of one Venkatapathi Naidu. By a deed dated

P. C.

Sakalaguna Nayudu v. Munuswami Nayakar.

Sir Lancelot Sanderson.

the 27th January, 1891, Venkata Subramania Aiyar, on behalf of himself and as guardian of his minor son Krishnasami Aiyar, sold the village of Siyatti to the abovementioned Venkatapathi for the consideration of Rs. 10,000.

On the same day the parties executed what was called a "counterpart document," by which it was provided that Venkatapathi should reconvey the said village to Venkata Subramania after a period of thirty years from that date, *i.e.*, in the *Ani* cultivation season of the thirtieth year, in case Venkata Subramania wished to have the village again, and upon his paying to Venkatapathi the sum of Rs. 10,000.

The learned Judges of the High Court treated the "counterpart document" as having been executed by Venkatapathi in favour of Venkata Subramania and his son Krishnasami, though the latter's name is not mentioned in the "counterpart document."

Their Lordships are of opinion that this was a right conclusion, because Venkata Subramania and Krishnasami were members of a joint Hindu family, and the deed of sale was executed by Venkata Subramania on behalf of his minor son as well as on his own behalf, and the "counterpart document" was obviously intended to give the right to call for a reconveyance of the property to the persons who were parties to the deed of sale.

In 1897 Venkata Subramania was adjudicated insolvent and in 1899 he died, leaving Krishnasami, his only son, surviving him.

By a deed dated the 12th May, 1910, Krishnasami sold the village of Siyatti to the plaintiff for the consideration of Rs. 19,200. It was agreed on behalf of the appellant that this deed contained not only a conveyance of the village but also an assignment of Krishnasami's right to the benefit of the "counterpart document."

By a deed dated the 22nd Feb., 1916, the Official Assignee of Madras, and "as such the assignee of the estate and effects of C. Venkata Subramania Aiyar," in consideration of the sum of Rs. 3,000 conveyed and assigned all the right, title and interest of the insolvent, Venkata Subramania, in the house and lands in Siyatti village described in the schedule thereto to the said Krishnasami Aiyar.

It appears that both Venkatapathi and Krishnasami died in or about the year 1919.

P. C.

Sakalaguna Nayudu v. Munuswami Nayakar.

Sir Lancelot Sanderson.

On the 29th June, 1920, notice was given on behalf of the plaintiff to the defendants, alleging that the plaintiff was the assignee from Krishnasami, and as such was entitled to the reconveyance of the property in suit. There is no question before the Board as to the sufficiency of the tender of the money referred to in the notice, nor is there any question as to whether the reconveyance was called for at the proper time.

On the 12th July, 1920, the present suit was instituted by the plaintiff.

On the 16th February, 1921, the widow of Krishnasami executed what was called a deed of release in favour of the plaintiff. The deed recited, among other matters, that Krishnasami had settled matters with the Official Assignee and had obtained from him a sale-deed for the benefit of the plaintiff in his own name, and had handed the same over to the plaintiff.

It concluded by stating that from the date on which Krishnasami executed the sale to the plaintiff, neither Krishnasami nor his widow, who was his heir, had any interest in the property comprised in the sale, and that even if there should be any interest possessed by the widow she relinquished the same to the plaintiff.

The evidence of the plaintiff with respect to the transaction with the Official Assignee was to the effect that he had contributed the sum of Rs. 1,500, part of the Rs. 3,000 paid to the Official Assignee, and that Krishnasami had given to him the receipt which the Official Assignee had granted in respect of such payment; that the deed of the 22nd February, 1916, was executed in favour of Krishnasami because the Official Assignee had said that it must be taken in the name of Krishnasami, but that the deed was obtained to safeguard the plaintiff's interest and for his benefit; and that the deed was handed by Krishnasami to the plaintiff after it had been registered.

The main question in this appeal is whether there was a contract made on the 27th January, 1891, between Venkatapathi of the one part and Venkata Subramania and Krishnasami of the other part, by which Venkatapathi undertook for consideration to reconvey the property if the other parties to the contract offered to purchase the same at the time stated and for the amount mentioned in the "counterpart document," or whether, as alleged on behalf of the appellants and held by the learned Subordinate Judge, there was no completed contract, but only a standing offer by Venkatapathi, the benefit of which could not

P. C.

Sakalaguna Nayudu v. Munuswami Nayakar.

Sir Lancelot Sanderson.

be assigned to a stranger such as the plaintiff, until the offer had been accepted by the tender of the amount in June, 1920, and the offer had ripened into a contract to buy and sell.

Their Lordships are of opinion that there was a completed contract between the parties on the 27th January, 1891.

All the elements necessary to constitute a contract were present. There was an undertaking on the part of Venkatapathi to reconvey the village to Venkata Subramania and Krishnasami in the event of their calling for a conveyance at the time and upon the terms set out in the "counterpart document." The time at which the option was to be exercised and the price which was to be paid for the property were specified.

There was consideration for the contract because Venkatapathi, by the sale of the 27th January, 1891, obtained possession of the property, and Venkata Subramania received Rs. 10,000, besides acquiring the right and benefit of getting back the village upon the conditions specified in the "counterpart document."

Their Lordships therefore concur with the conclusion of the learned Judges of the High Court on this question.

They are also of the opinion that it was not intended that the option could be exercised only by Venkata Subramania and Krishnasami personally. The terms of the contract and the time at which the option was to be exercised go to show that the intention was that the option might be exercised by the abovementioned two persons or their heirs.

It was not disputed that if the transaction of the 27th January, 1891, amounted to a completed contract, as their Lordships have decided, the benefit of the contract could be assigned.

The only further question is whether the benefit of the contract had been effectually assigned to the plaintiff before the suit was instituted.

It was argued on behalf of the appellant-defendants that on the insolvency of Venkata Subramania the property of the joint family, including the benefit of the above-mentioned contract, vested in the Official Assignee, and that the benefit of the contract never was assigned to the plaintiff. On the other hand, it was argued on behalf of the plaintiff that on the insolvency of Venkata Subramania the joint family property remained in the joint family subject to any action which the Official Assignee might take to get possession of Venkata Subramania's share.

In view of the facts of this case their Lordships do not think it necessary to enter upon the consideration of this question or to

decide which of the above-mentioned contentions is correct, because whichever of them be adopted, their Lordships are of opinion that the plaintiff must succeed.

If the first of the above-mentioned contentions be adopted, the plaintiff is entitled to rely on the conveyance of the 22nd February, 1916, by which the Official Assignee conveyed all the right, title and interest of the insolvent Venkata Subramania in the village to Krishnasami. It is clear on the evidence that this conveyance, though taken in the name of Krishnasami, was on behalf of, and for the benefit of, the plaintiff, who had supplied part of the money paid to the Official Assignee and who had already purchased the village and the benefit of the contract dated the 27th January, 1891, for valuable consideration.

Krishnasami had at the time of the conveyance by the Official Assignee no interest in the village or the contract, as was subsequently acknowledged by his widow and heir.

If the second of the above-mentioned contentions be adopted, then the deed of the 12th May, 1910, by which Krishnasami conveyed the village and assigned the benefit of the contract of the 27th January, 1891, to the plaintiff is sufficient to support the plaintiff's title and his right to sue for the enforcement of the said contract.

Their Lordships, therefore, are of opinion that whichever of the above-mentioned contentions be adopted, the benefit of the contract had become vested in the plaintiff before the institution of the suit, and the plaintiff, having made an adequate tender of the amount specified in the contract at the time mentioned therein, was entitled to call upon the defendants, the sons and heirs of Venkatapathi, for a conveyance of the property.

Their Lordships are of opinion that the decree of the High Court, dated the 5th March, 1925, was correct, and that this appeal should be dismissed with costs. They will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondent: *Douglas, Grant and Dold.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

The President, District Board, Anantapur .. *Petitioner* in both the petitions*

v.

Ismail Sahib and another .. *Respondents (Accused).*

The President, District Board, Anantapur v. Ismail Sahib.

Madras Local Boards Act (XIV of 1920), S 166—Bus driven along road without license—Liability of driver and owner for conviction

The driver of a motor bus as well as its owner are both guilty of an offence under section 166 of the Madras Local Boards Act if the bus is driven along a road without a license obtained from the President of the District Board to use that road.

Sivarama Mudaliar v. *Muthamman Aiyangar,* (1927) I L R 50 M. 913: 52 M.L.J. 561 followed.

Velayuda Mudali v. *King-Emperor,* (1919) I L.R. 43 M 438: 39 M.L.J 85 distinguished.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India Act praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Gooty in C.A. No. 40 of 1926 (C. C. No. 142 of 1926 on the file of the Court of the Stationary Sub-Magistrate of Gooty) and Petition to revise the judgment in the said C. C. No. 142 of 1926.

K. P. Ramakrishna Aiyar and *C. R. Lakshmikantha Mudaliar* for petitioner in both the petitions.

V. Balarama Aiyar for respondents in Cr. R. C. No. 202 of 1927.

Respondent in Cr. R.C. No. 203 of 1927 did not appear in person or by pleader.

The Court made the following

ORDER :—In these petitions the District Board of Anantapur is the petitioner. These arise out of a prosecution instituted by the District Board against the driver and the owner of a bus for infringing the notification issued by the President, District Board, on 11th June, 1926. The 2nd class Magistrate who tried the case acquitted the owner of the bus and convicted the driver under Ss. 166 and 207 of the Local Board's Act.

The appellate Court set aside the conviction of the driver. The District Board has preferred these revision petitions against

* Cr R. C. Nos. 202 and 203 of 1927.
Cr. R P. Nos 181 and 182 of 1927 10th October, 1927.

The President, District Board, Anantapur v. Ismail Sahib.

the order of the Appellate Magistrate and also against the order of the 2nd class Magistrate. The contention for the driver is that it is the owner of the bus that is liable if at all under Ss. 166 and 207 and not the driver who is only a servant. Reliance is placed on *Velayuda Mudali* v. *King-Emperor.*[1] That case has no application to the present. In order to see whether the driver of a vehicle comes within the provisions of the section, we have to look at the section itself. The first portion of S. 166 is in these terms:

"No person shall, on any public road in a district, ply any motor vehicle for hire or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a license obtained from the President of the District Board."

This covers the case of a person who plies any motor vehicle for hire or uses any vehicle for conveying passengers. It cannot be said that the driver of a car does not ply the car for hire when, as a matter of fact, he collects the fares from passengers. Though the owner may be liable for allowing the car to be taken along the road prohibited by the District Board, yet the responsibility of the driver who takes a car knowing that there is such a prohibition is not taken away by the mere fact that the master also is liable. The contention that the servant is merely obeying the orders of his master is no ground for relieving him of his liability when the section clearly covers the case of a person plying for hire whether it is his own car or not. There is no warrant for saying that the driver who drives a vehicle knowing perfectly well that he should not go along a particular road does not contravene the provisions of S. 166. I am clearly of opinion that the case of the driver is covered by S. 166. I therefore set aside the Appellate Magistrate's order and direct him to restore the case to file and dispose of it according to law. In considering the sentence to be awarded to the driver he may, of course, take into consideration the fact that the master also is liable. But this is a matter entirely within the discretion of the Magistrate and it is unnecessary for me to say anything more about it.

As regards the owner of the vehicle he is clearly guilty under S. 166. This point is covered by a distinct ruling of my brother Wallace, J., reported in *Sivarama Mudaliar* v. *Muthannan Aiyangar*[2] and it is unnecessary for me to repeat the observations of the learned Judge. I set aside the acquittal order of the owner

1. (1919) I.L.R. 43 Mad. 438: 39 M.L.J. 85.
2. (1927) I.L.R. 50 Mad. 913: 52 M.L.J. 561.

The President, District Board, Anantapur v. Ismail Sahib.

of the vehicle and direct the 2nd class Magistrate to take the case on his file and dispose of it according to law.

N.S. *Petitions allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Vaduga Kumara Nadar .. *Petitioner* (Accused).*

Vaduga Kumara Nadar, *In re.*

Madras Local Boards Act (XIV of 1920), Ss. 3 (14), 159 and 207—Prosecution against the representative of a community—Treasurer of the community if can be said to be the owner.

In order to make a person liable for disobedience under section 159 of the Madras Local Boards Act, he must be the owner or the occupier of any premises which caused the obstruction or encroachment. The word "owner" as defined in section 3 (14) of the Act includes a person for the time being receiving or entitled to receive the rents or profits of the property whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purpose. The mere fact that a person is one of the representatives of a community owning the properties and is a treasurer of some fund of the community and that he constructed the compound wall or formed a *Nandavanam* will not bring him within the meaning of the term "owner" in section 159, unless it is also proved that he is either the manager or the receiver or the trustee for the community

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional 1st class Magistrate of Melur Division in Cr. A. No. 20 of 1927 preferred against the judgment of the Court of the Special 2nd class Magistrate of Madura in Calendar Case No. 39 of 1926.

V. L. Ethiraj and *A. Rangaswami Aiyangar* for petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER:—This is an application to revise the order of the 1st class Magistrate of Melur Division declining to interfere with the conviction of the petitioner by the Special 2nd class Magistrate of Madura under section 159 (1) read with section 207 (1) (*c*) of the Madras Local Boards Act of 1920. The only point urged before me by Mr. Ethiraj is that a conviction under sections 159 and 207 cannot be had against the representative of a community. The prosecution was for dis-

---

*Cr. R. C. No. 751 of 1927.
Cr. R. P. No. 671 of 1927. 1st December, 1927.

Vadnga Kumara Nadar, *In re.*

obedience of an order to remove an obstruction to a public pathway.

The Sub-Magistrate in the course of his judgment observes that

"the petitioner is one of the representatives as the treasurer for the community. The charge against him is also in his capacity as a representative of Nadars although it is not stated so in the notice".

In appeal it was contended that the encroached portion belonged to the Nadar community and not to the accused in his private capacity. The Sub-divisional Magistrate observed in his judgment:

"It is idle to talk on behalf of the accused that the accused is not liable for prosecution as he is one of the community that is using the *Nandavanam*. The accused himself has admitted in his statement before the lower Court on 11th October, 1926, that he himself dug up a well and formed *Nandavanam* with a compound wall."

In order to make a person liable for disobedience under section 159 he must be the owner or the occupier of any premises which caused the obstruction or encroachment. The word "owner" is defined in section 3 (14) as including the person for the time being receiving or entitled to receive the rents or profits of the property whether on his own account or as agent, trustee, guardian, manager or receiver for another person or for any religious or charitable purpose. It is not the case for the prosecution that the petitioner himself is one of the persons in charge of the property or is a trustee who is entitled to receive the rents and profits of this *Nandavanam* or one who manages on behalf of the community the affairs of the *Nandavanam*. The fact that he constructed the compound wall or formed a *Nandavanam* would not be sufficient to make him an owner if he had before the date of the notice created a trust in favour of the whole community in respect of the *Nandavanam* and divested himself of all interest in it. He says that he has no interest in it and that he made over the property to the community.

From the judgment of the 2nd class Magistrate and from the contention of the accused it cannot be said that he is either the manager or the receiver or the trustee for the community. The mere fact that he is a treasurer of some fund of the community would not make him a trustee of the *Nandavanam* or bring him within the meaning of the term 'owner' as used in the Local Boards Act. I, therefore, set aside the conviction and direct a re-trial of the case and the prosecution would be

Vadaga Kumara Nadar, *In re.*

entitled to adduce evidence to show that the petitioner is a person coming within the definition of the term 'owner' in section 3, clause 14, or occupier of the *Nandavanam*. The fine paid will be refunded.

N.S. *Conviction set aside and re-trial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO AND MR. JUSTICE REILLY.

Kypreth Moithiyan Kutty .. *Appellant** (*Plff.*)

v.

Natukandy Puthiapurayil Mammali and others .. *Respondents* (*Defts.*)

Moithiyan Kutty *v.* Mammali

Malabar Law—Marumakkatayam Law—Husband—Gift by, to wife and his children by her—Estate taken under—Wife having children by former husband—Effect—Corporate unit not known to law—Creation by private individual of—Power of

When a follower of Marumakkatayam Law makes a gift of property to his wife and children, she having already children living by a former husband, the donees take the property as ordinary donees each entitled to an equal share in the same as tenants-in-common, and not with the incidents of tarwad property such as impartibility attached to it.

However clear the intention of the donor might have been, he had no power to constitute a tavazhi of his wife and his own children leaving out her other children and attach to the properties gifted by him the incidents of tarwad property.

It is not open to a private individual, by his own act, to create a corporate unit not known to law and enable it to hold property with the incidents confined to such recognised unit only.

Second appeal against the decree of the District Court of North Malabar in A.S. No. 166 of 1922 preferred against the decree of the Court of the District Munsif of Cannanore in O.S. No. 654 of 1920.

[The case was originally heard by Krishnan and Venkatasubba Rao, JJ., who delivered judgments calling for findings on some issues.]

D. A. Krishna Variar for appellant.

K. P. M. Menon and *P. Govinda Menon* for respondents.

The Court delivered the following

Krishnan, J.

JUDGMENTS:—*Krishnan, J.*—The question argued in this second appeal is whether when a follower of Marumakkatayam Law makes a gift of property to his wife and children, she having already children living by a former husband, the donees

---

*S.A. No. 163 of 1924. 3rd February, 1928.

take the property with the incidents of tarwad property such as impartibility attached to it or only as ordinary donees each entitled to an equal share as tenants-in-common.

Three cases have been cited to us as having a bearing on the question—*Kunhacha Umma* v. *Kutti Mammi Hajee*,[1] *Chakkra Kannan* v. *Kunhi Pokker*[2] and *Imbichi Beevi Umma* v. *Raman Nair*.[3] It was laid down in *Kunhacha Umma* v. *Kutti Mammi Hajee*[1] that when a Marumakkatayam man's property is given to his wife and children without any expression of intention how they were to enjoy it, they must be held to have taken it with the incidents of property held by a tarwad. It will be noted that in this case the wife and children constituted a tavazhi consisting of a woman and all her children and there was not the complication of some of her children not being included as in the present case. The gift was to a subsisting tavazhi and it was held following the principle laid down by the Privy Council in *Sreemutty Sourjemoney Dossee* v. *Denobundoo Mullick*[4] and *Mahomed Shumsool* v. *Sheewukram*[5] that in considering a man's intention his ordinary notions regarding property should be borne in mind. This case was accepted and followed in a number of cases—see *Koroth Amman Kutti* v. *Appu Nambiar*,[6] *Pattatheruvath Pathumma* v. *Mannamkunniyil Abdulla Haji*,[7] *Kunhamina* v. *Kunhambi*,[8] *Katankandi Koma* v. *Siva Sankaran*,[9] *Chakkantavida Chakkan Abdulla* v. *Thashath Cheekkootti*,[10] *Ummanga* v. *Appadorai Pattar*[11] and in spite of the adverse criticism of Sir Sankaran Nair, J., and of the difficulties pointed out by him in the application of the principle laid down in it, in his order of reference, it was affirmed and followed again in the Full Bench decision in *Chakkra Kannan* v. *Kunhi Pokker*.[2] We must, therefore, accept it as good law. But the question we have to decide in the present case is essentially different, it being in reality whether a tavazhi can be constituted by a woman and some of her children only, they being children of one father, others being excluded and whether such a group of members is a recognised group in Malabar Law entitled to hold property

1. (1892) I.L.R. 16 Mad. 201: 2 M.L.J. 226 (F.B.).
2. (1915) I.L.R. 39 Mad. 317: 29 M.L.J. 481 (F.B.).
3. (1919) I.L.R: 42 Mad. 869: 37 M.L.J. 220.
4. (1857) 6 M.I.A. 526
5. (1874) L.R. 2 I.A. 7 (P.C.)
6. (1906) I.L.R. 29 Mad. 322.
7. (1907) I.L.R. 31 Mad. 228: 18 M.L.J. 16.
8. (1908) I.L.R. 32 Mad. 315.
9. (1909) 20 M.L.J. 134.
10. (1910) I.L.R. 34 Mad. 245: 20 M.L.J. 368.
11. (1910) I.L.R. 34 Mad 387: 20 M.L.J. 218.

Moithiyan Kutty v. Mammali.

Krishnan, J.

with the special incidents of tarwad property. A tavazhi as known to Malabar Law has no doubt been recognized as having such a right; *Chakkra Kannan* v. *Kunhi Pokker*[2] is an authority for it. As pointed out by Srinivasa Aiyangar, J., in that case it is not the giving of property by a person to his wife and children that constitutes a tavazhi but there being a tavazhi already they take the property with the incidents of tarwad property. Are we then to extend the principle to the case of a group of persons consisting of a woman and her children by one husband only when she has other children who are not included? A tavazhi has been always understood as consisting of a mother and all her children and descendants in the female line. See *Raman Menon* v. *Raman Menon*,[12] *Kenath Puthen Vittil Tavazhi* v. *Narayanan*[13] and *Krishnan* v. *Damodaran*[14]. It is such a tavazhi that forms a corporate unit capable of holding property as such. Srinivasa Aiyangar, J., says in *Chakkra Kannan* v. *Kunhi Pokker*[2] :

"These groups (that is, tavazhies) cannot, of course, be created by agreement of parties"

and he again observes:

"I am also of opinion that some only of the members of a tavazhi cannot form a corporate unit capable of holding property as such."

I respectfully agree with these observations. It seems to me that it is not open to any man, by his own act, to create a corporate unit not known to law and enable it to hold property with the incidents confined to such recognised units only. It follows, therefore, we cannot recognise a body consisting of a woman and some of her children only as a tavazhi and if property is given to them they would take it as ordinary joint donees, in which each will be entitled, in the absence of any express provision to the contrary, to an equal share.

It is argued, however, that a tavazhi of a mother and her children by a father, not including her other children has been recognised by Sadasiva Aiyar, J., in *Chakkra Kannan* v. *Kunhi Pokker*[2] and by a Bench in *Imbichi Beevi Umma* v. *Raman Nair*.[3] The point that arose for decision in the latter case was whether a woman's son by a first husband took any interest in property

---

2. (1915) I.L.R. 39 Mad. 317 at 335, 336: 29 M.L.J. 481 (F.B.).
3. (1919) I.L.R. 42 Mad. 869: 37 M.L.J. 220.
12 (1900) L.R. 27 I.A. 231: I.L.R. 24 Mad. 73 at 76: 10 M.L.J. 245 (P.C.).
13. (1904) I.L.R. 28 Mad. 182: 14 M.L.J. 415 (F.B.).
14. (1912) I.L.R. 38 Mad. 48 at 53: 24 M.L.J. 240 (F.B.).

Moithiyan Kutty v. Mammali.

Krishnan, J.

gifted by her second husband to her and her children. The learned Judges held that there was no scope for any presumption that the second husband intended to benefit his wife's children by another man, her first husband, and therefore the plaintiff in that suit who was such a child had no right to sue for such property even though he was the eldest male member of the tavazhi as a whole. I respectfully agree with the decision. There was, however, no question in the case as to how the children of the second husband took the property gifted, whether with or without the incidents of tarwad property. It is true that there are some observations in the judgment which would imply that the learned Judges thought that a woman and her children by one husband to the exclusion of those by another could constitute a tavazhi by themselves holding property jointly. With all respect to them I think that when they speak of a tavazhi they are not giving it the proper legal connotation. A group of persons following Marumakkatayam may hold property jointly as any other group may do, but they do not thereby become a tavazhi and such property does not get the incidents of tarwad property attached to it. The head-note in the case merely repeats the observations of their Lordships. Those observations are clearly *obiter dicta* and I do not feel myself bound by them in consequence. The observation of Sadasiva Aiyar, J., is also an *obiter dictum*. The reason given for it, namely, that we can have tavazhies and sub-tavazhies under them and so on is not a reason for saying that a mother and some of her children alone can constitute a tavazhi; in each case whether of tavazhies or sub-tavazhies or tavazhies which are sub-tavazhies of them, they will be found to consist of a mother and all her children and descendants in the female line.

On the view I take it follows that however clear the intention of the donor might have been in the present case, he had no power to constitute a tavazhi of his wife and his own children leaving out her other children and attach to the properties gifted by him the incidents of tarwad property. The evidence as to his intention is, therefore, of little importance. The donees must be taken to have obtained the properties as partible properties in the position of tenants-in-common. The plaintiff's assignors, therefore, had an assignable share in them. There must be findings on Issue 1, second part, and Issue 2, before disposing of the case. The learned District Judge will submit such findings on the evidence on record in six weeks from this day. Ten days will be given for objections.

Moithiyan-Kutty v. Mammali.

Venkatasubba Rao, J

Venkatasubba Rao, J.:—The question raised by this second appeal is of some importance and not covered by authority. The case was argued on the footing that there was a gift of certain properties made by a man to his wife and children by that wife. The parties are governed by the Marumakkatayam Law and at the time of the gift there were children in existence of the lady in question by a former husband. The short question to be decided is, do the donees take the property subject to the incidents of ordinary tarwad or tavazhi property—one such incident being impartibility? The Marumakkatayam Law recognises a tarwad as a unit and a tavazhi being a sub-division of a tarwad, the Courts have also recognised it as a legal entity. The common feature of a tarwad as well as a tavazhi is, that each of these consists of a female and her descendants in the female line. The Marumakkatayam Law says that property held by a tarwad or tavazhi is subject to certain incidents. In *Kunhacha Umma* v. *Kutti Mammi Hajee*[1] it was held that when a piece of land was given by a husband to one of his wives and her children and they were subject to the Marumakkatayam Law, it must be presumed that they took the lands with the incidents of property held by a tarwad. In that case, the property was given to a tavazhi, a unit known to law, for the donees were the woman and all her descendants. In the present case, at the time of the gift, the lady had children by her former husband who would be members of her tavazhi, but who were not among the donees. The gift was thus made not to a tavazhi but only to a few members of it. The contention that a woman's children by a particular husband can form a tavazhi is opposed to the basic principle of the Marumakkatayam Law, which recognises the mother and not the father as the source of the line of descent. A tavazhi, any more than a tarwad, cannot be created by act of parties and it follows from this that a man at his option cannot constitute his wife and some of her children into a tavazhi. The fact that the group consists of every one of his children begotten on her is an irrelevant detail in this connection, as under the Marumakkatayam Law descent cannot be traced, as I have said, from the father. The incidents of tarwad property will, therefore, attach only to a gift made to all the members of the tavazhi including the children by other husbands in existence at the time. *Chakkra Kannan* v. *Kunhi Pokker*[2] merely affirms the principle laid down in *Kunhacha Umma* v.

1. (1892) I.L.R. 16 Mad. 201: 2 M.L.J. 226 (F.B.).
2. (1915) I.L.R. 39 Mad. 317 29 M.L.J. 481 (F.B.).

Moithiyan Kutty v. Mammali.

Venkatasubba Rao, J.

Kutti Mammi Hajee[1] and is not an authority for the position contended for the respondent. Nor does *Imbichi Beevi Umma* v. *Raman Nair*[2] support this contention. A female by name Goli Amma married twice and had children by her first husband Rarappan Nair; she afterwards married Raman Nair by whom she had a son Kelu Nair and other children. A gift was made by Raman Nair in favour of his wife Goli Amma and his children by her. Goli Amma's son by her first husband sued as karnavan of the main tarwad claiming an interest in the properties, the subject of the gift. It was held that where a husband gives property to his wife and children there is no presumption that he intended to benefit her children by a former husband. This is the point decided and I entirely concur in the decision. The case itself is therefore not an authority for the respondents' contention, but he relies upon certain *obiter dicta* in that case as well as in *Chakkra Kannan* v. *Kunhi Pokker*[3] already referred to. I do not feel bound by these observations and I must express my most respectful dissent from them.

Each of the donees in the present case can, in this view, assign his share and the plaintiff as transferee is entitled to maintain the action. I, therefore, agree in the order contained in my learned brother's judgment.

[On receipt of the findings the case came on before Venkatasubba Rao and Reilly, JJ., who set aside the judgment of the Lower Courts and passed a preliminary decree in favour of plaintiff.]

A.S.V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CURGENVEN.

Local Fund Overseer, Mayavaram .. *Petitioner* in both petitions (Petitioner—Complainant)*

v.

Pakkirisami Thevan .. *Respondent in both petitions (Accused).*

Local Fund Overseer, Mayavaram v. Pakkirisami Thevan.

Madras Local Boards Act (XIV of 1920), S. 166 (1)—"Plying any motor vehicle for hire"—Meaning of—Motor car let out for hire within a

---

*Cr. R.C. Nos. 100 and 101 of 1927.

(Cr. R.P. Nos. 90 and 91 of 1927). 23rd September, 1927.

1. (1892) I.L.R. 16 Mad. 201: 2 M.L.J. 226 (F.B.).
2. (1915) I.L.R. 39 Mad. 317: 29 M.L.J. 481 (F.B).
3. (1919) I.L.R. 42 Mad. 869: 37 M.L.J. 220.

Local Fund Overseer, Mayavaram v. Pakkirisami Thevan.

Municipality—Car travelling beyond the Municipal limits and traversing District Board roads—Necessity for license from District Board.

The "plying of a motor vehicle for hire" means the act of waiting for soliciting custom, and, therefore, so soon as any person has hired it, the act of plying for hire is complete. It cannot be said that a vehicle plies for hire on a public road merely because it is made use of as a hired vehicle on that road. The act of plying for hire can only be done at the place and time that the hiring is effected; in other words, a vehicle cannot be said to ply for hire on a road unless the actual hiring takes place on that road.

A person who lets out his car for hire within a Municipality need not obtain a license from a District Board, if the car travels beyond the Municipal limits and traverses any of the District Board roads.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Stationary 2nd class Magistrate of Mayavaram in Calendar Cases Nos. 200 of 1926 and 179 of 1926 respectively.

Sir K. V. Reddi and *P. V. Rangaram* for petitioner.

K. S. Lakshminarasimha Aiyar for respondent.

The Public Prosecutor for the Crown.

The Court made the following

ORDER:—These two revision petitions have been filed on behalf of the District Board of Tanjore against the judgments of the Stationary Sub-Magistrate of Mayavaram acquitting the accused in each case of an offence punishable under S. 207 (*a*) and Schedule VIII of the Local Boards Act. Under S. 166 (1) of that Act

"No person shall, on any public road in a district, ply any motor vehicle for hire, or use any such vehicle for carrying passengers or goods at separate fares or rates on such road, except on a license obtained from the President of the District Board."

Under the further provisions mentioned above failure to obtain a license is punishable. In C.C. No. 179, to which Criminal Revision Case No. 101 relates, the complaint against the accused was that he

"committed the offence of plying a motor car, Tan. 234, for hire in the District Board Road No. 7-A, two trips, from Mayavaram to Tranquebar, without obtaining the license from the President, District Board, Tanjore."

The terms of the complaint in the other case, C.C. No. 200 of 1926, were similar. In the former case the prosecution adduced the evidence of a Local Fund Maistry stationed at Porayar, which we understand is adjacent to Tranquebar, to the effect that the accused's car used to come and stand in the hired car-stand there and obtain passengers. The Sub-Magis-

Local Fund Overseer, Mayavaram v. Pakkirisami Thevan.

trate, we gather, has not accepted this evidence, but it is unnecessary for us to consider whether he should be supported in this finding because the evidence appears to be clearly inconsistent not only with the terms of the complaint but also with those of the question put to the accused. The case was tried as a summons case and he was asked to show cause why he should not be convicted upon a complaint that he had plied his motor car for hire from Mayavaram to Tranquebar on the 27th, 28th and 29th March, 1925 without obtaining a license. Although, however, the terms of the complaint were not supported by the prosecution evidence, a defence witness was examined who deposed that the accused was in the habit of letting out his car for hire to vakils, Mirasdars and others wishing to engage a car for a trip from Mayavaram. It may be taken, therefore, that the accused in this case admitted hiring out his car for journeys from Mayavaram. In the other case (C.C. No. 200) the question put to the accused was in similar terms and the evidence was in consonance with it. In both the cases only the first portion of S. 166 (1) would apply, because admittedly there is no proof that the vehicles were used for carrying passengers or goods at separate fares or rates. Accordingly the question we have to decide is whether a person who lets out his car for hire in Mayavaram, which is a Municipality, must obtain a license from the Tanjore District Board, if the car travels beyond the municipal limits and traverses any of the District Board roads. The argument of Sir K. V. Reddi for the District Board is that a vehicle plies for hire on a public road if it is made use of as a hired vehicle on that road, so that it is not a necessary condition that the actual hiring should take place upon that road. The alternative view is that the plying of a motor vehicle for hire means the act of waiting for soliciting custom, and that therefore so soon as any person has hired it the act of plying for hire is complete. If this be so, that act was committed, if at all within the Municipality of Mayavaram, and not within the District Board area, so that no license would be required from the District Board and these cases would fail.

We have no doubt that the latter is the correct view. The phrase "to ply for hire" is used in the English as well as in the Indian enactments relating to hackney and stage carriages, and we have been shown no reason why the same signification should not be attached to it in India as in England. Our attention has been drawn to three English cases. In the earliest of these,

Local Fund Overseer, Mayavaram v. Pakkirisami Thevan.

Clarke v. *Stanford*,[1] the question which arose was whether a carriage which stood on the premises of a Railway Company to await the arrival of trains, with the object of conveying any passenger who chose to hire it, was plying for hire within the meaning of the Metropolitan Public Carriage Act of 1869. The case turned upon whether the railway premises, not being a public place were a place in which a vehicle could be said to ply for hire, and although that question does not arise here, it is clear from the judgments that 'plying for hire' was taken to mean the act of soliciting custom. This is made clear too in *Sales* v. *Lake*[2]. Certain persons arranged to run a charabanc from London to Brighton, all seats being booked and tickets paid for beforehand and no other passengers being accepted. The charabanc started from Grosvenor Gardens, where it was joined by passengers with their tickets, and the question was whether it was a stage carriage plying for hire at that place. This question was answered in the negative. Lord Trevethin. C. J., expressing the view that a carriage could not accurately be said to ply for hire unless two conditions were satisfied: "(1) There may be a soliciting or waiting to secure passengers by the driver or other person in control without any previous contract with them, and (2) the owner or person in control who is engaged in or authorises the soliciting or waiting must be in possession of a carriage for which he is soliciting or waiting to obtain passengers." Mr. Justice Avory delivered himself to the same effect. This case is, therefore, authority not only for the view that "plying for hire" is an act which results in the vehicle being hired and not an act consequential upon the hiring but also for a distinction between plying for hire, that is obtaining passengers on the spot and without any previous arrangement, and merely letting out a car for hire by previous arrangement. The third English case, *Leonard* v. *Western Services, Ltd.*[3] affords a fairly close parallel with the circumstances now in question. A lady purchased a return ticket by motor omnibus from Newport in Wales to Risca, travelling to Risca by one of the omnibuses of the company and returning by another. The omnibuses were licensed to ply for hire in Newport but were not so licensed in Risca. The question was whether the return omnibus, in accepting the lady as a passenger on the strength of her return

---

1. (1871) L.R. 6 Q.B. 357. 2. (1922) 1 K.B. 553.
3. (1927) 1 K.B. 702.

ticket, was plying for hire in Risca. This point was found against, Lord Hewart, C. J., observing

Local Fund Overseer, Mayavaram v. Pakkirisami Thevan.

"There is no occasion for soliciting passengers within the district (Risca). It is not open to the omnibus driver by diligence or by skill to attract to his employers the customers of other employers. There is therefore no plying for hire in the District, the hiring having already been done."

And Salter, J., said:

"Without attempting any exhaustive definition of the expression, I think that in order to constitute 'plying for hire' within the meaning of the Acts there must be a general invitation by the person in charge of the vehicle to the members of the public to make contracts with him for carriage in the vehicle."

It is quite clear from these decisions that the act of plying for hire can only be done at the place and time that the hiring is effected—in the present instance at Mayavaram—and that is a sufficient finding to dispose of these cases. We do not need to enter into the question as to what precisely the act should consist in; but it is clear that not every case of hiring out a vehicle will fall within its meaning. We dismiss the Criminal Revision Cases.

N.S. *Criminal Revision Cases dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Ramalinga Odayar and another .. *Petitioners** (*Accused*).

Ramalinga Odayar, *In re.*

Criminal Procedure Code (V of 1898), S. 526—Order of transfer—Notice to accused—Necessity of—Order if final—Re-transfer of case—Power of Court.

A Court should, before passing an order of transfer, give an opportunity to the accused to show cause why the transfer should not be made.

An order of transfer is not a final order. If sufficient grounds are shown, a case once transferred can be re-transferred to the same Magistrate or transferred to any other Magistrate.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing (1) the transfer of C.C. No. 23 of 1927 on the file of the Court of the Sub-divisional Magistrate of Mayavaram now pending before the Additional District Magistrate of Tanjore back to the Court of the Sub-divisional Magistrate of Mayavaram, and (2) stay of further proceedings in the case before the Additional District Magistrate of Tanjore pending disposal of this petition.

---

*Cr. M.P. No. 640 of 1927. 29th November, 1927.

Ramalinga Odayar, *In re.*

V. L. Ethiraj and *S. Nagaraja Aiyar* for petitioners.

The Public Prosecutor for the Crown.

The Court made the following

ORDER:—This is an application for transfer of C.C. No. 23 of 1927 on the file of the Court of the Sub-divisional Magistrate, Mayavaram, now pending before the Additional District Magistrate, Tanjore, back to the Sub-divisional Magistrate of Mayavaram. The main ground urged by Mr. Ethiraj is that his clients, the accused, were not given notice before the transfer was ordered. In cases of transfer, the District Magistrate, before passing an order of transfer, should give an opportunity to the accused to show cause why a transfer should not be made. In this case, the accused were not given notice of the application for the transfer of the case and the learned District Magistrate seems to have thought that he had no power to revise his own order. It cannot be said that an order of transfer is a final order. If sufficient grounds are shown, the case once transferred can be re-transferred to the same Magistrate or transferred to any other Magistrate who in the opinion of the District Magistrate would be the proper person to try the case. On the sole ground that the accused had no notice of the application for transfer, I set aside the order of the District Magistrate. It is open to him to transfer the case back to the Sub-divisional Magistrate of Mayavaram or to transfer the case to the Additional District Magistrate or to any other Sub-divisional Magistrate who in his opinion should try the case.

N.S. *Order of the District Magistrate set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Sami Vannia Nainar and another .. *Petitioners** (*Petitioners*)

v.

Periaswami Naidu and another .. *Respondents* (*Respondents*).

Sami Vannia Nainar *v.* Periaswami Naidu.

Criminal Procedure Code (*V of* 1898), *S.* 476 (*b*)—*Proceedings under—Applicability of S.* 428 *to—Appeal against order under S.* 476—*Additional evidence in—Jurisdiction to receive.*

S. 428 of the Criminal Procedure Code, which empowers an appellate court to take evidence, has no application to proceedings under S. 476 (*b*) thereof.

---

*C.R.P. No. 363 of 1927. 21st November, 1927.

Held, therefore, that in an appeal against an order of the District Munsif under S. 476 of the Code, the District Judge had no jurisdiction to allow an affidavit to be filed before him and to base his judgment thereon, and that the fact that the affidavit was not objected to before him was immaterial.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order dated 30th April, 1926, of the District Court of South Arcot in O.P. No. 167 of 1925.

K. S. Jayarama Aiyar for petitioners.

M. Patanjali Sastri for respondents.

The Court delivered the following

JUDGMENT:—This is an application to revise the order of the District Judge of South Arcot declining to interfere with an order under S. 476, Criminal Procedure Code, passed by the District Munsif of Vridhachalam. Mr. Jayarama Aiyar's contention is that the learned District Judge had no jurisdiction to take additional evidence in a matter coming up under S. 476 (*b*). The District Judge allowed an affidavit of the respondent's vakil to be filed before him and has relied mainly upon the affidavit in his judgment. It was held by a Bench of this Court in *Krishna Reddi* v. *Emperor*[1] that a superior Criminal Court acting under S. 195 of the Criminal Procedure Code against the order by an inferior Criminal Court granting sanction had no power to take or call for further evidence. S. 195 has been amended and S. 476 empowers a Court, Civil, Revenue or Criminal, to forward a complaint to a Magistrate of the first class for inquiry into an offence which, it has reason to hold, has been committed before it. Under S. 476 (*b*) an Appellate Court has power to withdraw the complaint or to direct a complaint to be filed when the lower Court declines to prefer a complaint. The decision in *Krishna Reddi* v. *Emperor*[1] applies to a case coming under section 476 (*b*), for the section of the Criminal Procedure Code, which empowers the Appellate Court to take evidence, that is, section 428, has no application to proceedings under section 476 (*b*).

The learned District Judge says that the affidavit was not objected to as if that was a ground for his relying upon it. Whether the petitioners' vakil objected to the reception of the affidavit or not, it is immaterial if the Court had no jurisdiction to receive the affidavit as evidence in an appeal against an order of the District Munsif under S. 476.

1. (1909) I.L.R, 33 M. 90; 20 M.L.J. 102.

Sami Vannia Nainar v. Periaswami Naidu.

It is strongly urged by Mr. Patanjali Sastri for the respondents that this is a matter more than three years old and that I should not interfere in revision with the order of the District Judge, even though he acted without jurisdiction. The fact that the offence was committed more than three years ago is a matter for consideration by the District Judge. It is sufficient to remark here that the order of the District Munsif is very unsatisfactory. He says in paragraph 6 :

"I think that the production of this document is due only to carelessness and not to any deliberate fraudulent intention."

It is difficult to see how it could be said when a party to a suit presented a document and relied upon it that he did so owing to gross carelessness. It was open to the District Munsif to have refused to take action under S. 476 for other reasons than the reasons he has given. Seeing that the District Judge has acted without jurisdiction in receiving an affidavit in evidence and relying upon it, I set aside his order and direct him to restore the petition to file and dispose of it according to law. Petitioner is entitled to costs in this Court.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Pasuvathia Pillai .. *Petitioner* (Accused).*

Pasuvathia Pillai, *In re.*

Indian Penal Code (XLV of 1860), Ss. 352 and 353—Warrant for arrest made out in the name of a forester—Endorsement of warrant by forester to watcher—Arrest by watcher—Legality—Assault of watcher by the accused who questioned the power of the watcher to arrest—Nature of offence—Madras Forest Act, S. 51—Criminal Procedure Code, Ss. 77 and 79—Scope of.

A warrant was made out in the name of a forester for the arrest of two persons. The forester endorsed the warrant to a forest watcher for execution. The watcher along with a forest guard went and arrested two persons for an alleged forest offence When they were being taken along the road, the accused came and told the watcher "What extraordinary warrants are these ? Do you still possess the nerve to enter the *paracheri* ?" and gave a slap on the cheek and told the warrantees to run away. The accused was convicted of an offence under S 353 of the Indian Penal Code by the Trial Magistrate and the same was confirmed in appeal.

Held, (on revision), (1) that granting for argument's sake that a watcher could be considered a forest officer within the meaning of S. 51

---

*Cr. R.C. No. 547 of 1927. 1st December, 1927.
(Cr. R P. No. 486 of 1927.)

of the Madras Forest Act, the arrest by him could not be justified under that section as there was no suggestion that the warrantees refused to give their names and residence or that they gave any false name and false residence or that there was reason to believe that they would run away;

(2) that the entrustment of the warrant to the forest officer for execution was illegal as it could not be justified under S. 77 of the Criminal Procedure Code, because it was not proved that there was a necessity for immediate arrest and that no police officer was immediately available, and consequently the endorsement by him to the watcher was also illegal;

(3) that even if the endorsement of the warrant by the forester to the watcher be considered to be legal, it would not confer any power upon the watcher to arrest the person named in the warrant, as S. 79 of the Criminal Procedure Code had no application to forest officers;

(4) that, consequently, the watcher could not be said to have been executing a lawful warrant and the offence was not one which would fall under S. 353 of the Indian Penal Code;

(5) that, though an unprovoked assault on a person would constitute an offence under S. 352 of the Indian Penal Code, the conviction should not be altered to one under S 352 in the peculiar circumstances of this case, especially as the accused had been in jail for three weeks.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Dindigul in Criminal Appeal No. 28 of 1927 preferred against the judgment of the Court of the Stationary 2nd Class Magistrate of Palni in Calendar Case No. 463 of 1927.

V. L. Ethiraj and *A. Rangaswami Aiyangar* for petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER:—This is an application to revise the order of the Sub-divisional Magistrate declining to interfere with the conviction of the petitioner under S. 353, I.P.C., by the second class Magistrate of Palni. The only point for consideration in this case is whether a warrant drawn up in the name of a forester could be validly endorsed by him to a forest watcher. The warrant was made out in the name of a forester for the arrest of two persons. The forester endorsed the warrant to a forest watcher for execution. The watcher along with a forest guard went and arrested two persons for an alleged forest offence. When they were being taken along the road the petitioner is said to have come and told the watcher "What extraordinary warrants are these? Do you still possess the nerve to enter the *paracheri*?" and gave a slap on the cheek and told the warrantees to run away. If the watcher was justified in arresting the warrantees under the warrant no doubt he was dis-

Pasuvathia Pillai, *In re.*

charging his duty as a public servant and the assault would be an attack on a public servant in the discharge of his duty. If under the law the forester had no power to endorse the warrant made out in his name in favour of a watcher for execution then the watcher who acts upon it cannot be said to be executing a lawful warrant and therefore the offence, if at all, is not one which would come under S. 353. The only section in the Madras Forest Act that has been brought to my notice as being relevant is S. 51. It reads :

> "Any forest officer or police officer may, without orders from a Magistrate and without a warrant, arrest any person reasonably suspected of having been concerned in any forest offence punishable with imprisonment for one month or upwards if such person refuses to give his name and residence or gives a name or residence which there is reason, to believe to be false, or if there is reason to believe he will abscond."

In order to justify the act of a police officer or a forest officer in arresting without warrant a person suspected of a forest offence he must either have refused to give his name or must have given a false name and residence or there must have been reason to believe that he would abscond. In the absence of any of these conditions no police officer or forest officer could lawfully arrest a person without a warrant. In this case it is not suggested that the persons, who are said to have been arrested, refused to give their names and residence or they gave any false name and false residence, or there was a reason to believe that they would run away. Therefore S. 51 does not apply to the case, granting for argument's sake that a watcher could be considered a forest officer under S. 51.

The entrustment of a warrant of arrest is regulated by S. 77, Criminal Procedure Code; the second portion of clause (1) is as follows :

> "The Court issuing such a warrant (that is a warrant of arrest) may, if its immediate execution is necessary and no police officer is immediately available, direct it to any other person or persons."

First of all there must be the necessity to arrest and then there must be the necessity for immediate arrest and then there must be the third condition, that no police officer is immediately available. In the absence of these three conditions a Court is not justified in entrusting a warrant to a forest officer for execution. That being so, the entrustment of the warrant to the forester itself is not legal and the endorsement of the warrant in favour of the watcher could not empower the watcher to arrest any person. Moreover, S. 79, Criminal Procedure Code,

Pasuvathia Pillai, *In re.*

has no application to forest officers and the endorsement of the warrant even if it be legal by the foresters in favour of the watcher could confer no power upon the watcher to arrest the person named in the warrant. The offence is not one coming under S. 353. The learned Public Prosecutor contends that the offence would come under S. 353 and therefore the conviction should be altered to one under that section. No doubt an unprovoked assault on a person would constitute an offence under S. 352, but the circumstances of this case are peculiar. Two persons were improperly arrested on an illegal warrant by a watcher and they were marched from the place of arrest along a public road evidently to the Police Station. The accused came on the scene and from the evidence it appears he asked "What is the meaning of this extraordinary warrant?" or "What is this extraordinary procedure?" or words to that effect and seeing two of the men under actual arrest, that is, under wrongful confinement, he seems to have given a slap on the cheek. At best it is a trivial offence and I do not think that in the circumstances of the case there should be a conviction under S. 352 especially when it is brought to my notice that the petitioner was in jail for three weeks. I allow this petition and quash the conviction under S. 353 and direct that the fine if paid be refunded.

N. S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Venkatachalam Chettiar .. *Plaintiff**

v.

Annapurni Ammal and others .. *Defendants.*

Venkatachalam Chettiar *v.* Annapurni Ammal.

Limitation Act (IX of 1908), Art. 144—Adverse possession—Co-heirs—Onus of proof—Ouster—Assertion of hostile title.

As between co-heirs the onus of proof is heavy upon the party who asserts that he has been in adverse possession, and, in order that possession may be adverse, there must be a disclaimer on the part of the co-owner setting up adverse possession, of the other's right, by an open and unequivocal assertion of a hostile title.

In the case of co-heirs, the question of adverse possession may arise in three ways : First, possession of the entering heir may be from the outset adverse and on his own behalf; secondly, while the entering co-heir

*C.S. No. 878 of 1925. 23rd January, 1928.

may originally take possession on behalf of all, he may subsequently change his intention and hold the property adversely and on his own behalf; and thirdly, there may be a prior joint occupation in fact, but one of the co-heirs may subsequently obtain sole possession under a hostile claim of title and rely upon that possession to support an exclusive right.

Where, on the death of the widow of the last male owner, two persons *A* and *B* became entitled to his property as his *bandhus* of the same degree, but *B* alone applied along with his wife to the Collector for the issue of a certificate in the joint names of himself and his wife, claiming that himself and his wife inherited the property from the last registered proprietor, *viz.*, the widow of the last male owner, and the Collector passed an order recognising this right set up by *B* and his wife and in pursuance of this order a Collector's Certificate was issued in the joint names of *B* and his wife, and they entered into possession of the property and subsequently executed mortgages over the property containing a recital that the property had been orally gifted by the widow of the last male owner to *B's* wife, and later on, *B* executed a deed of release in favour of his wife reciting therein that the property always belonged to his wife, but that his name was coupled with hers in the Collector's Certificate as it was considered desirable to associate a male with his wife in the transaction,

Held, that *A* must be taken to have been ousted by *B*, when *B* took possession of the property in pursuance of the Collector's Certificate and that *A* had notice of the same, as he must have held to have had knowledge, *B's* possession having been open, notorious, and visibly hostile

K. Narasimha Aiyar for plaintiff.

K. Krishnaswami Aiyangar with *C. Rangaswami Aiyangar* for 1st defendant.

V. Radhakrishniah with *K. E. Rajagopalachari* for 2nd and 3rd defendants.

S. E. Sankara Aiyar for 5th defendant.

The Court delivered the following

JUDGMENT:—This is a stale and unfounded claim. The following pedigree shows the relationship of the parties:

Samu Chetti.

- Papammal m. Chockappa Chetti.
  - Venkatachalam Chetti (Plaintiff).
  - Munuswami Chetti d. 1st Nov. 1910 m. Annapurni (1st defendant)
    - Govindaraju (d. about 1921).
- Thangammal.
  - Suppammal.
    - Narayanaswami (d. 1892 or 1893) m. Velliammal d. 1902-03.

Venkatachalam Chettiar v. Annapurni Ammal.

The plaintiff states that, over twenty years ago, on the death of Velliammal, he became entitled to the suit house, 1|92, Thambu Chetti Street, Madras, along with his brother Munuswami, the husband of the 1st defendant. It is not disputed that in the ordinary course the plaintiff and Munuswami would have taken Narayanaswami's property on his widow's death as his *bandhus*.

The house in question was purchased in 1892 by Narayanaswami. He had no issue and he and his wife brought up Annapurni, the 1st defendant, as their foster-daughter. The latter was a near relation of Velliammal, being her niece, and that was the reason why she was so brought up. The evidence shows that she was brought over from a village when she was five years old and was brought up with great affection by Narayanaswami and Velliammal. In course of time they married this girl to Munuswami, the plaintiff's brother. Narayanaswami died within a year or so of the purchase of the suit house and Velliammal succeeded to the same and was in enjoyment of it till her death in 1902 or 1903. Before her death, it would seem that she gave an oral direction that the 1st defendant was to take the house. She was to take this property and to pay some moneys to Velliammal's brothers. This was the desire expressed by Velliammal before her death. Mr. Narasimha Aiyar, the plaintiff's vakil, objects—and I think very rightly—to this evidence going in, if the object of adducing it, is to base a title upon an oral gift in favour of Annapurni, but the evidence has been given only to show the nature of the possession taken by Annapurni and her husband on the death of Velliammal. Then the question arises : In assertion of what right did they take possession of the house? As I have said, there is no doubt that, under the law, the persons who became entitled to the property were the plaintiff and Munuswami. What really happened was that, on Velliammal's death, Annapurni and her husband applied to the Collector of Madras for the issue of a certificate in their joint names, claiming that they inherited the property from the last registered proprietor, Velliammal. This statement is, of course, not true, for the heirs rightfully entitled to take the property were the plaintiff and Munuswami. But we are not now concerned with the truth or falsehood of this statement. In the application it was asserted, and wrongly, that Annapurni and Munuswami succeeded as Velliammal's daughter and son-in-law respectively. This is the first assertion of title and it clearly

negatives the plaintiff's right to take the property as a reversionary heir of Narayanaswami. Thereupon, the Collector passed an order—and this again was wrong—recognising the right set up by the two claimants. In pursuance of this order, a Collector's Certificate was issued in the joint names of Annapurni and Munuswami. This happened in 1903. We thus find that they entered into possession under a claim of title adverse to the plaintiff. Let us then see what happened next. They executed two mortgages, one in 1903 and the other in 1904. The recitals in these mortgages are important, as they show that the mortgagor's title was traced to the oral gift alleged to have been made by Velliammal. Here again was an assertion of a hostile title which was inconsistent with the right of the plaintiff. Then we pass on to a transaction of 1910, which has a very important bearing on the question at issue. Munuswami execuetd a deed of release in favour of Annapurni, and in that he recites that the property always belonged to his wife but that his name was coupled with hers in the Collector's Certificate, as it was considered desirable to associate a male with Annapurni in the transaction. Then the deed goes on to recite that, by reason of this fact, he was executing the release deed in question, showing clearly that Annapurni alone was the owner. A few months after this, that is, on the 1st November, 1910, Munuswami died leaving an infant son, Govindaraju. The latter died in 1921, but, in the meantime, in 1920, Annapurni sold the property to the 2nd and 3rd defendants, who, in their turn, mortgaged it with defendants 4 and 5. The short question is, have the defendants acquired title by adverse possession?

Now, turning to the oral evidence, there can be no manner of doubt that the plaintiff never intended to claim the house and that he allowed his brother and Annapurni to take possession of it without protest or objection. It was true that when he occasionally came from his village and visited Madras, he was received by his brother at the suit house, but this was done, not because that any one imagined that the plaintiff had a right, but, as between brothers, this was but natural. I do not believe that the plaintiff received a pie of income from this house; indeed, this is inconsistent with his case in the plaint. Annapurni's evidence was frank and straightforward and I am disposed to regard her as a truthful witness. The plaintiff says that he and his brother owned some lands of trifling value in the mofussil and that they were members of a joint undivided Hindu family. This may be strictly correct, for I do not

think that any partition has been proved; but it is impossible to believe, on the evidence, that Munuswami enjoyed these lands or derived any profit therefrom. The real truth is, that he regarded himself as a member of his wife's family and, as on account of that position he practically acquired a valuable house, he paid no regard to the mofussil lands, which he permitted his brother, the plaintiff, to enjoy exclusively. I accept Annapurni's evidence and hold that Munuswami got nothing and cared to get nothing from the mofussil lands, and, similarly, the plaintiff never participated in the profits of the Madras house.

On these facts, what is the true legal position? I quite recognise that in a case of this sort the test is not, has the plaintiff been out of possession for twelve years? It is for the defence to make out adverse possession and as between co-heirs the onus is heavy upon the party who asserts that he has been in exclusive possession. It is settled law, that in order that possession may be adverse, there must be, on the part of the co-owner setting up adverse possession, a disclaimer of the other's right, by an open and unequivocal assertion of a hostile title. Acts which would amount to dispossession, if done by strangers, would not, in the case of a co-sharer, be construed as such, for the reason, that each of the co-owners being entitled to the enjoyment of the property, it will be presumed, until the contrary is shown, that the acts were not unlawful acts but were done in the exercise of a lawful right. In the case of co-heirs, the question of adverse possession may arise at least in three ways: first, possession of the entering heir may be from the outset adverse and on his own behalf; secondly, while the entering co-heir may originally take possession on behalf of all, he may subsequently change his intention and hold the property adversely and on his own behalf; and thirdly, there may be a prior joint occupation in fact, but one of the co-heirs may subsequently obtain sole possession under a hostile claim of title and rely upon that possession to support an exclusive right. The present case is of the first description. Immediately on the death of Velliammal, Munuswami took possession under an open claim of title hostile to the plaintiff. On the facts of the case I must find that the plaintiff was ousted and that he had notice of the same may be easily inferred. It is hardly necessary that notice of disclaimer should be express or explicit when the party ousted must be held to have had knowledge, the adverse

Venkatachalam Chettiar v. Annapurni Ammal.

claimant's possession having been open, notorious and visibly hostile. It is impossible to hold that the plaintiff was not aware of the way in which Munuswami and Annapurni obtained possession and enjoyed the property. I am satisfied that he never thought of asserting this right and came forward with his dishonest claim, only after he found that the property passed to strangers. The plaintiff's suit fails and I dismiss it with costs of defendants 2 and 3.

N.S. *Suit dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE CORNISH.

The Public Prosecutor .. *Appellant**

v.

Budipiti Devasikamani .. *Accused.*

The Public Prosecutor v. Devasikamani.

Penal Code (XLV of 1860), S. 84—Defence under—Onus of—Proof of, on accused—S. 86—Criminal intent required for offence—Proof of—Presumption of—Wrongfulness of act—Accused's knowledge of—Presumption from—Insanity—Plea of—Proof of.

The onus of proving the defence afforded by S. 84 of the Penal Code rests upon the accused.

Though S 86 of the Penal Code lays down that, in certain classes of cases, the intoxicated person shall be liable to be dealt with as if he had not been intoxicated, it does not provide that he shall be dealt with as if he had the same intent. Ordinarily, intention may be inferred from knowledge; but in cases in which intent must be found as a fact and cannot be assumed, voluntary drunkenness may be relied upon to show that the required "intent" is absent. Where the evidence shows that the accused knew that the act he was doing was a wrongful act, the Court can presume from such knowledge that he must have had the criminal "intent" requisite for the offence.

In a case in which the accused was charged with an offence punishable under S. 436 of the Penal Code, *held,* on the evidence, that the accused had not established the plea of insanity.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Agency Sessions Judge of East Godavari in Sessions Case No. 5 of 1927 on his file.

The Public Prosecutor for appellant.

K. S. Varadachari for accused.

---

*Cr Appeal No. 374 of 1927 4th October, 1927.

The Public Prosecutor v. Devasikamani. Madhavan Nair, J.

The judgment of the Court was delivered by

Madhavan Nair, J.:—The accused in this case was charged before the learned Agency Sessions Judge, East Godavari, that he; on the 19th of June, 1926, committed mischief by setting fire to the thatched building of the Board Elementary School at Gurtedu, with intent to destroy the same, an offence punishable under section 436 of the Indian Penal Code. The prosecution case is that the accused took a torch from the kitchen, ran to the building, put it to the thatch and then threw it on the roof of the kitchen and ran away. The thatch caught fire and the school building was completely destroyed. The learned Sessions Judge found that the accused set fire to the school building but acquitted him on the ground that he was insane at the time when he did it and was therefore incapable of forming the intention or of having the knowledge which forms an essential ingredient of the offence. Against this acquittal the Crown has presented this appeal.

The accused is a smoker of ganja. There is evidence to show that, as a result of this vicious habit, he used to threaten to beat his father and children, and used to beat his wife and run away into the forest; he would not take his food properly and when he was given it he would throw it away. The evidence also shows that he used to tear his cloth and wander about in the forest. He was kept under observation in the Central Jail at Rajahmundry for a fortnight. The Medical Officer who examined him found no reason to pronounce him insane at that time.

The learned Public Prosecutor contends that the plea of insanity is not borne out by these facts, that at the most the evidence would only show that the accused used to get voluntarily intoxicated by smoking ganja off and on and that voluntary intoxication is no defence to a criminal act.

The learned vakil for the accused argues that the evidence is to the effect that ganja smoking has induced in the accused incapacity to understand the quality or nature of his wrongful act and has produced in him a condition akin to that of *delirium tremens* in the case of a drunken man and that, even if this is not the case, under section 86 of the Indian Penal Code the accused can rely upon voluntary intoxication in defence when he is charged as in this case with an offence of which 'intent' is a necessary ingredient.

The onus of proving the defence afforded by section 84 of the Indian Penal Code clearly rests upon the accused. See *Queen-*

The Public Prosecutor v. Devasikamani.

Madhavan Nair, J.

Empress v. *Irappa*[1]. As regards the first contention, we have no doubt that the evidence does not warrant a finding that the accused's habit of smoking ganja had induced in him a diseased state of mind so as to make him incapable of understanding the wrongfulness of his act. The Civil Surgeon found 'no case to pronounce him insane' ; but according to his evidence the accused looked "more sad than insane". Though smoking ganja might account for the queer things which the accused used to do, we do not think that the facts in this case, viewed in the light of well-known judicial decisions, such as *Queen-Empress* v. *Venkataswami*[2], *Queen-Empress* v. *Lakshman Dagdu*[3] and *Queen-Empress* v. *Sakharam Valad Ramji*[4], are strong enough to give him exemption from the criminality of his conduct under section 84 of the Indian Penal Code. The fact that he ran away after putting the torch to the thatch shows that at the time he committed the offence he was conscious that what he was doing was wrongful.

As regards the second contention, the wording of section 86 of the Indian Penal Code lends some support to the argument advanced before us. That section lays down that, in certain classes of cases, the intoxicated person shall be liable to be dealt with as if he had not been intoxicated ; but it does not provide that an intoxicated person shall be dealt with as if he had the same *intent*. The second part of the section speaks of *knowledge* only and omits any reference to *intent*. Whether this omission is intentional or not, as pointed out by Mr. Mayne, it may be due to the fact that in the majority of cases the question of intention is merely the question of *knowledge*. If the accused knew what the natural consequences of his acts were, ordinarily he must be deemed to have intended to cause them. See *Re Mandru Gadaba*[5] per Ayling, J. Though ordinarily intention is to be inferred from knowledge, there may be cases where intent must be found as a fact and cannot be assumed in which cases voluntary drunkenness may be relied on to show that the required 'intent' is absent. In England it will be a question in such cases for the Jury to decide whether having regard to the mental condition of the prisoner, the general inference of intention from knowledge can reasonably be drawn. This, we

1 Ratan Lal's Unreported Criminal Cases of the Bombay High Court, p. 818.
2. (1889) I.L.R. 12 M. 459.
3. (1886) I.L.R. 10 B. 512.
4. (1890) I.L.R. 14 B. 564.
5 (1914) I.L.R. 38 Mad. 479.

think, is the utmost that could be said in favour of this contention. Even according to this restricted interpretation in this case, the evidence makes it clear that, in spite of the ganja smoking, the accused had the requisite criminal intent, because as soon as he put the torch to the thatch he ran away. He knew that the act he was doing was a wrongful one and from this knowledge we can assume that he must have had the criminal 'intent' requisite for the offence. Further, the evidence shows that the accused himself was a school master in the same school for about a year and that, when his father who had retired from the school found that his son was behaving badly he (the father) made a report asking for his son six months' leave. The accused must have apprehended that the result of the report would be the termination of his connection with the school and therefore he must have deliberately set fire to the building to show his annoyance.

The Public Prosecutor v. Devasikamani. — Madhavan Nair, J.

In view of the evidence, the gist of which we have set forth above, we do not think that the plea of insanity has been established in this case.

We must, therefore, set aside the acquittal of the accused and convict him of the offence under section 436 of the Indian Penal Code with which he was charged and sentence him to undergo one year's rigorous imprisonment. We order accordingly.

A.S.V. *Order of acquittal set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

The Public Prosecutor .. *Appellant**

v.

Chidambaram and another .. *Respondents (Accused).*

The Public Prosecutor v. Chidambaram.

Criminal Procedure Code (V of 1898), S. 154—Information recorded under—Telegram disclosing the commission of an offence if an—Telegram disclosing the commission of a cognizable offence—Examination by police officer of party sending—Statement recorded at—Admissibility—Ss. 154, 157, 162—*Investigation in S.* 162—*Meaning of*—Alibi—*Plea of—Proof strict of—Necessity—S.* 157—*Action under, on telegram—Power of.*

One *D* sent a telegram to the Circle Inspector of Police complaining of the commission of a cognizable offence by the accused. On receipt of

---

*Cr. Appeal No. 409 of 1927 and Cr. R. C. No. 265 of 1927. Cr. R. P. No. 237 of 1927. 22nd November, 1927.

The Public Prosecutor v. Chidambaram.

the telegram the Circle Inspector and the Sub-Inspector went to the place from which the telegram had been sent and the Sub-Inspector examined *D* and recorded his statement, which gave details of the offence which he alleged to have been committed.

Held, that the telegram could not be held to be an information recorded under S. 154, Criminal Procedure Code, because (1) it was not reduced to writing on an oral statement, and (2) it was not a writing given to the police signed by the person making the statement.

Investigation in S. 162, Criminal Procedure Code, means some action taken by the Police to collect evidence. The examination of *D* by the Sub-Inspector was not for the purpose of collecting evidence, but was merely for the purpose of seeing whether his suspicion that an offence had been committed was justified.

Held, therefore, that the statement recorded by the Sub-Inspector was not inadmissible under S. 162, Criminal Procedure Code, on the ground that it was a statement made in the course of an investigation.

A police officer will be acting in excess of his powers in taking action under S. 157 of Criminal Procedure Code on the receipt of a mere telegram disclosing the commission of a cognizable offence, for, so far as authenticity goes, a telegram stands in no better position than village gossip.

A plea of *alibi* must be definitely proved in order to suffice for the rebuttal of a case made out by the prosecution.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the Sub-divisional Magistrate of Devakottai in C. A. No. 8 of 1927 preferred against the judgment of the Court of the Taluk Magistrate of Tirupattur in C. C. No. 188 of 1926 and Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Devakottai in C. A. No. 8 of 1927 preferred against the judgment of the Court of the Taluk Magistrate of Tirupattur in C. C. No. 188 of 1926.

The Public Prosecutor for the Crown.

V. L. Ethiraj and *K. S. Venkatarama Aiyar* for respondents (accused 3 and 4) in Criminal Appeal No. 409 of 1927 and for petitioners (accused 1, 2, 5, 6 and 7) in Cr. R. C. No. 265 of 1927.

S. Nataraja Nadar for *K. Rajah Aiyar* for complainant in Cr. R. C. No. 265 of 1927.

The judgment of the Court was delivered by

Phillips, J.

Phillips, J.:—The facts of this case are as follows:—One Dr. Doraiswami Pillai was assaulted by the accused and he thereupon sent a telegram, Exhibit A-1, to the Circle Inspector of Police.

The Public Prosecutor v. Chidambaram.

Phillips, J.

"I was beaten severely by fifteen vellombers with hands and shoes tightening me this evening 5 in the bazaar, myself lost silk specs and rupees fifteen afraid much pray police *bandobast*."

This telegram was received by the Circle Inspector and he and the Sub-Inspector went to Kandanoor from which place the telegram had been sent and the Sub-Inspector examined Doraiswami Pillai and recorded his statement, Ex. B-1. This has been admitted in evidence as the information recorded under section 154 of the Criminal Procedure Code.

It is now contended by Mr. Ethiraj for the accused that this document is inadmissible in evidence as it is a statement recorded in the course of an investigation under section 162. His contention is that Ex. A-1 is itself the information recorded under S. 154 and that the subsequent statement taken by the Police in the enquiry is one taken under S. 162. In the first place, it is difficult to see how this telegram can be a statement contemplated in S. 154. Such a statement, if given orally, has to be reduced to writing and read over to the informant and, if it is given in writing, signed by the person giving it. Here it certainly was not reduced to writing on an oral statement, nor is it a writing given to the Police signed by the person making the statement. It cannot therefore be the document referred to in section 154. There is, however, a second contention that this telegram gave information of a cognizable offence; and under section 157 an officer in charge of a police station is empowered to investigate if he has reason to suspect the commission of an offence which he is empowered under section 156 to investigate. It is possible that this might have been recorded as a crime in the station register and the officer might at once have decided to hold an investigation, possibly arresting the accused on the strength of the telegram; but this undoubtedly would have been in excess of his duties for, as observed in *In re Nandamuri Anandayya*,[1] so far as authenticity goes, a telegram stands in no better position than village gossip. There is no guarantee that a telegram received has actually been sent by the person who purports to send it and it undoubtedly would be the duty of the Police Officer on receiving the telegram to verify the fact that it was really sent as it purports to have been sent. In this case the Police Officer went to the place from which it was sent and examined the person by whom it purported to have been sent. He confirmed the fact of sending it and gave other details of

1. (1914) 25 I.C. 630.

The Public Prosecutor v. Chidambaram.

Phillips, J.

the offence which he alleged to have been committed. There is no reason to suppose that it was in the course of an investigation which, I take it, means some action taken by the Police to collect evidence. Here his purpose was not to collect evidence but to see whether his suspicion that an offence had been committed was justified. This cannot be said to be a statement taken in the course of the investigation. This is the view taken in *In re Nandamuri Anandayya*[1] and also in a recent Calcutta case in *Dargahi* v. *Emperor*.[2] A number of other cases have been referred to *Chandrika Ram Kahar* v. *King-Emperor*,[3] *Gansa Oraon* v. *King-Emperor*[4], *Emperor* v. *Kampu Kuki*[5] and *King-Emperor* v. *Daulat Kunjra*.[6] It is unnecessary to discuss these cases in detail for there is nothing in any of them which directly conflicts with the view above stated. Ex. B-1 was therefore admissible in evidence and we therefore see no reason to interfere in revision.

The Public Prosecutor has filed an appeal as regards accused 3 and 4 who were acquitted in the Appellate Court. They did not plead *alibi;* but, in the course of the defence evidence, evidence was given of their being at another place. In support of that statement a post card was exhibited. The post card was produced at a very late stage of the enquiry and no explanation was given for its non-production earlier and therefore it really can have very little weight in a case of this kind. *Alibi* evidence should be scrutinised very carefully, for it is very easy to set up *alibi* and not always easy to prove it and it must be definitely proved in order to suffice for the rebuttal of a case made out by the prosecution. We think the Sub-divisional Magistrate was wrong in accepting this evidence against the view taken by the Taluk Magistrate who had seen these witnesses giving evidence. If the matter were *res integra*, we think these two accused should also have been convicted, but inasmuch as this is an appeal against an acquittal and the offence is not a serious one, we think it unnecessary to interfere.

The appeal is dismissed.

A.S.V. *Appeal dismissed.*

---

1. (1914) 25 I.C. 630.
2. (1924) I.L.R. 52 C. 499.
3. (1922) I.L.R. 1 Pat. 401.
4. (1923) I L R. 2 Pat. 517.
5. (1902) 11 C.W.N. 554.
6. (1902) 6 C.W.N. 921.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE DEVADOSS

Ramathai Anni .. *Appellant* in A.A.A.O. No. 133 of 1927 and Petr. in C.R.P. No. 937 of 1927 (L.R. of 1st Respt.)*

v.

K. Kanniappa Mudaliar and another .. *Respondents in both (Creditor-Petitioner).*

Ramathai Anni v. Kanniappa Mudaliar.

Provincial Insolvency Act (V of 1920), S. 17—Creditor's petition to adjudicate debtor as insolvent—Death of debtor before the passing of the order of adjudication—Effect.

Though a person against whom a petition for adjudication as an insolvent is presented dies before the passing of the order of adjudication, the Court can pass an adjudication order against him or his estate under S. 17 of the Provincial Insolvency Act S. 17 applies to the case of a debtor dying before the order of adjudication whether the petition for adjudication was presented by a creditor or by the debtor himself.

Venkatarama Aiyar v. *Official Receiver, Tinnevelly,* (1927) I.L.R. 51 M. 344 : 54 M.L.J. 585 followed.

Appeal against the order of the District Court of Tinnevelly, dated 21st March, 1927, in C. M. A. No. 95 of 1925, preferred against the order of the Court of the Subordinate Judge of Tinnevelly, dated 22nd August, 1925 and made in I.P. No. 19 of 1924 and in I.A. No. 1612 of 1924 on the said I.P. No. 19 of 1924.

K. V. Krishnaswami Aiyar and *T. S. Vaidhianatha Aiyar* for appellant.

B. Sitarama Rao, S. R. Muthuswami Aiyar and *R. Krishnaswami Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS :—*Devadoss, J.*—This appeal arises out of an application of a creditor to adjudge a person an insolvent. The facts are, one Vedamurthi Mudaliar, a well-to-do landowner of Melasevval in the Tinnevelly District, was the Karaswan of two chits to which the 1st respondent was a subscriber. He drew the prizes but was not paid the prize amount excepting a small portion. Vedamurthi Mudaliar became heavily involved in debt and became unable to pay the amount due to the 1st respondent and on 24th January, 1922, he filed an application under the Provincial Insolvency Act for adjudging Vedamurthi

Devadoss, J.

*C.M.S.A. No. 133 of 1927 20th January, 1928.
C.R.P. No. 937 of 1927.

Ramathal Ammal v. Kanniappa Mudaliar.

Devadoss, J.

Mudaliar an insolvent alleging various acts of fraudulent preferences and fraudulent alienations, particularly one in favour of a relation, Muthu Kamakshiappa Mudaliar, for Rs. 48,000. Vedamurthi Mudaliar contested the petition on various grounds, the main ones being that the 1st respondent was not a creditor and that nothing was due to him in respect of the chit transaction, that he had not committed any act of bankruptcy, that the alienation in favour of Muthu Kamakshiappa Mudaliar was *bona fide* and for valuable consideration, that he was not in insolvent circumstances, and that he was able to pay his debts. He died in August, 1924, before his adjudication. The 1st respondent applied to the Sub-Court of Tinnevelly to bring on record the widow of Vedamurthi Mudaliar as his legal representative and hear his petition on the merits. The Subordinate Judge overruling the objection of the widow made her a party to the petition and adjudicated Vedamurthi Mudaliar an insolvent. On appeal the District Judge of Tinnevelly confirmed the order of the Subordinate Judge. The widow has preferred this appeal.

Mr. K. V. Krishnaswami Aiyar, who appears for the appellant, raises three contentions against the order of the District Judge :

(1) If a person against whom a petition for adjudication as an insolvent is presented dies before the passing of the order of adjudication, no adjudication order can be passed against him or his estate;

(2) There was no good petitioning creditor's debt on which an application for adjudication could be founded; and

(3) Vedamurthi Mudaliar did not commit an act of bankruptcy, or, in other words, there was no available act of bankruptcy which could be the foundation of a petition for adjudication.

Point No. 1.—The argument of Mr. Krishnaswami Aiyar is that a person in order to be adjudged an insolvent must be alive and that there is no provision in the Provincial Insolvency Act for passing an adjudication order against the estate of a deceased person, and he relies upon the wording of section 7 as supporting his contention. The last clause of the first paragraph of S. 7 is

"and the Court may on such petition make an order (hereinafter called an order of adjudication) adjudging him an insolvent".

It is urged that the words "adjudging him an insolvent" must be given its ordinary meaning and therefore

after a person's death he cannot be adjudged an insolvent and his estate cannot be so adjudged, for no order can be passed against the estate as the Court can only adjudge a person an insolvent and not his estate. Reliance is also placed upon sections 21, 24 and 25. Section 21 refers to interim proceedings against the debtor, section 24 to the procedure on hearing and section 25 to the dismissal of the petition. These sections no doubt provide for the course to be pursued in hearing a petition for adjudication. There are provisions in sections 21 and 24 for service of notice on the debtor and for his appearance and for other matters. From this it is argued that the Provincial Insolvency Act can only be enforced against a person who is alive and not against a person who is dead. This argument, however ingenious it may be, overlooks the plain provisions of section 17 of the Act which is in the following terms:

"If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued so far as may be necessary for the realisation and distribution of the property of the debtor."

This section provides for the case of a debtor who has presented an insolvency petition or against whom an insolvency petition has been presented dying during the pendency of the proceedings against him. Mr. Krishnaswami Aiyar's contention with regard to this section is that it only applies to a person who has been adjudged an insolvent before his death and not to a person dying before the order of adjudication is passed. This argument is against the clear terms of the section. It applies to the case of a debtor by whom or against whom an insolvency petition has been presented and does not confine itself only to the case of a debtor who had been adjudged an insolvent, and who dies before the proceedings come to a termination. There is no warrant for reading into the section the words "and adjudged insolvent" after the words "has been presented". If the legislature wanted this section to govern only the cases of persons adjudged as insolvents, it could have said so in plain terms. This section is a re-enactment of section 10 of the Provincial Insolvency Act, III of 1907, with a slight modification. That section was in these terms:

"If a debtor by or against whom an insolvency petition has been presented dies, the proceedings in the matter shall, unless the Court otherwise orders, be continued as if he were alive"

The words "as if he were alive" were omitted and the words "so far as may be necessary for the realization and

Ramathai Anni v. Kannlappa Mudaliar.

Devadoss, J.

distribution of the property of the debtor" were introduced in section 17. Mr. Krishnaswami Aiyar argues that the legislature made a deliberate change in the law by the introduction of the words "so far as may be necessary for the realization and distribution of the property of the debtor" and whatever may be the law under the old Act, under the present Act a person who has not been adjudged insolvent before his death could not be adjudged after his death even though he dies pending the application for adjudicating him an insolvent. The old section 10 was the same as section 93 of the Presidency Towns Insolvency Act of 1909 and section 108 of the Bankruptcy Act of 1883. It was held both under the English Bankruptcy Act and the Presidency Towns Insolvency Act that the proceedings in insolvency did not come to an end if a person by or against whom an insolvency petition was presented died before the order of adjudication was made. In *In re Hardy, Hardy* v. *Farmer*[1] it was held that the Court of Bankruptcy had jurisdiction to proceed in the bankruptcy of a person under section 108 and section 18, sub-section 11 of the Bankruptcy Act notwithstanding his death. Chitty, J., observed :

"I think, following the principle on which the Divisional Court acted, there would be jurisdiction in the Court of Bankruptcy to proceed under the 108th section, as there are no circumstances in that case to make it unjust for the Court to order otherwise, that is, to stop the bankruptcy proceedings."

Mr. Krishnaswami Aiyar relied upon the case of *Ex parte Sharp*[2] as laying down the law that section 108 could only apply to the case of a debtor who has presented an insolvency petition and not to a person against whom an insolvency petition has been presented. No doubt, in that case, Cave, J., and Grantham, J., sitting as a Divisional Court held that where the petition is presented by the debtor himself the adjudication could be made after his death. But section 108 is not to be confined only to the case of a debtor dying after he presented the insolvency petition, for the wording is "If a debtor by or against whom a bankruptcy petition has been presented dies." There is no warrant for overlooking the clear words "or against whom" as if they had no meaning. With regard to *Ex parte Sharp*[2], *In re Easy*[3] Chitty, J., observed :

"These decisions show that the construction put upon the 108th section is a general one, and I am not able to find any ground upon which

1. (1896) 1 Ch. 904. 2. (1886) 34 W.R. 550.
3 (1887) 19 Q.B.D. 538.

it would be reasonable, in my opinion, to say that the provisions of that section are not applicable to sub-section 11 of S. 18."

See also *Re Walker*[4].

There was some difficulty felt as to service of notice after the debtor's death. Rule 156 (*a*) of the Bankruptcy Rules was framed in order to give power to the Court to order substituted service in the case of death, or in cases where notice could not be served on the debtor. The portion of the rule that is relevant for the present purpose is as follows:—

". . . or that for any other cause prompt personal service cannot be effected, it may order substituted service to be made by delivery of the petition to some adult inmate at his usual or last known residence or place of business, or by registered letter, or in such other manner as the Court may direct, and that such petition shall then be deemed to have been duly served on the debtor."

Rule 7 of the Madras Provincial Rules framed under the Provincial Insolvency Act puts the matter beyond doubt:

"If a debtor, against whom an insolvency petition has been admitted, dies before the hearing of the petition, the Court may order that notice of the order fixing the date for hearing the petition shall be served on his legal representative or on such other person as the Court may think fit in the manner provided for the service of summons."

In the old Indian Insolvency Act there was no specific provision for continuing the proceedings on the insolvent's death before adjudication, notwithstanding that, the proceedings were continued against the debtor. This defect has now been remedied by section 93 of the Presidency Towns Insolvency Act.

The words "so far as may be necessary for the realization and distribution of the property of the debtor" were enacted in the place of the words "as if he were alive" in order to obviate any objection that may be put forward to the continuation of the proceedings by reason of some of the provisions contained in the Provincial Insolvency Act such as those in section 43 with regard to the application for discharge. The latter portion of the first paragraph of section 43 is :

". . . . If the debtor does not apply for an order of discharge within the period specified by the Court, the order of adjudication shall be annulled, and the provisions of section 37 shall apply accordingly."

A deceased person cannot apply for discharge. If the words "as if he were alive" were in section 43, it might be contended that no application having been made within the time fixed by the Court for discharge the adjudication should be annulled. There are other provisions in the Act

4. (1886) 3 Morr. 69.

Ramathal Ammal v. Kanniappa Mudaliar.

Devadoss, J.

with regard to the conduct of the insolvent. In order to obviate any difficulty that might arise in continuing the proceedings by reason of these provisions the words abovementioned were enacted. All that is necessary after the insolvent's death is to see that the assets of the insolvent are realized and distributed among the creditors. The Court is not interested after the insolvent's death in considering his conduct except in so far as applications for setting aside fraudulent preferences and fraudulent alienations are concerned. The words "so far as may be necessary," etc., make the meaning of the section 17 clear, namely, that after the debtor's death the proceedings in insolvency do not come to an end, whether he had been adjudicated an insolvent before his death or not.

It is not disputed that if the adjudication had been made before the debtor's death the proceedings could be continued against the estate, and the objection that it cannot be continued if he had died before adjudication is on the face of section 17 untenable.

A further argument was urged that the Presidency Towns Insolvency Act makes provision for the administration of the estate of a perosn dying in insolvent circumstances and there is no corresponding provision in the Provincial Insolvency Act. It is no doubt true that under section 108 of the Presidency Towns Insolvency Act the estate of a person dying in insolvent circumstances could be administered in insolvency on the application of a creditor whose debt would have been sufficient to support the insolvency petition against the debtor had he been alive. But the absence of this provision in the Provincial Insolvency Act does not lend support to the contention of the appellant that if the debtor dies before the adjudication order, the proceedings against him under the Insolvency Act cannot be proceeded with.

It is further urged that no order of adjudication could be passed but the proceedings may be continued for the purpose of paying the creditors. This argument overlooks the fact that the assets of the insolvent could not be realized unless his estate is vested in the Official Receiver, for no person would sell what is not vested in him, and the property of an insolvent vests in the Court only on adjudication under the Provincial Insolvency Act, and the Court by an order vests the property in the Official Receiver. If there is no vesting of the property in the Court or in the Official Receiver, how could the Court

Ramathal Anni v. Kanniappa Mudaliar.

Devadoss, J.

or receiver proceed to realise the insolvent's assets? The order of adjudication is therefore essential for the realisation and distribution of the property of the debtor. When the Court orders an insolvent's estate to be administered in insolvency under section 108 of the Presidency Towns Insolvency Act, the property of the deceased vests in the Official Assignee under section 109 of the Act, and under the Provincial Insolvency Act it is only on adjudication that the property of the insolvent could be ordered to vest in the Official Receiver.

This point was specifically decided by Madhavan Nair and Jackson, JJ., in *Venkatarama Aiyar* v. *Official Receiver, Tinnevelly.*[5] The learned Judges held that

"There is no reason why we should assume that the law according to the Provincial Insolvency Act should be understood in a different way from the law according to the Presidency Towns Insolvency Act."

We have no hesitation in holding that section 17 of the Provincial Insolvency Act applies to a case of a debtor dying before the order of adjudication whether the petition for adjudication was presented by a creditor or by the debtor.

Point No. 2.—It was attempted on behalf of the appellant to show that the judgment of the Subordinate Judge in a previous proceeding, Exhibit B, was misunderstood by the District Judge. We have looked at the judgment and we cannot say that the learned District Judge has misconstrued Exhibit B. What the Subordinate Judge found in O.S. No. 34 of 1921 was that, instead of the 1st respondent being indebted to Vedamurthi Mudaliar, Vedamurthi Mudaliar was indebted to the 1st respondent, and so he dismissed Vedamurthi Mudaliar's suit against the 1st respondent. From the evidence it is quite clear that a large sum of money was due to the 1st respondent from the deceased Vedamurthi Mudaliar. We agree with the learned Judge in holding that the 1st respondent's debt was one upon which an application for adjudication could be founded.

Point No. 3.—This is also one of fact. It was urged that there is nothing to show that Exhibit A was executed with a fraudulent intention and that the learned Judge was not justified in finding that it was an act of bankruptcy. From the nature of the document and from the circumstances of the case both the Courts have come to the conclusion that the document was executed for the purpose of defeating or delaying creditors. A

5. (1927) I.L.R. 51 M. 344: 54 M.L.J. 585.

Ramathal Anni v. Kanniappa Mudaliar.

Devadoss, J.

mere perusal of the document is sufficient to show that the debtor received no present advantage by transferring the larger portion of his property in favour of Muthu Kamakshiappa Mudaliar. The consideration was Rs. 48,000 and the present advance was only Rs. 439; the rest was all to be paid to creditors. This was executed on the 25th October, 1921 and the petition for adjudication was filed on 24th January, 1922. Muthu Kamakshiappa Mudaliar is a near relation of the debtor. The debtor was in embarrassed circumstances at the time as is clear from the evidence. He could not have derived any benefit to himself by selling the property at that time; and the consideration for the sale deed was a large amount, nearly the whole of which was to be paid to creditors. A jury is entitled to come to the conclusion on the evidence that the transaction was a fraudulent one and under section 6 such a transaction is an act of bankruptcy. In a case not dissimilar to the present it was held by a Bench of this Court that the transaction was a fraudulent one—*The Official Assignee of Madras* v. *Sheikh Moideen Rowther.*[6] We agree with the lower Courts in holding that the transaction was a fraudulent one and that there was an available act of bankruptcy for the creditor to apply under the Act for the adjudication of Vedamurthi Mudaliar as an insolvent.

In the result the appeal fails and is dismissed with costs. Two sets to be paid out of the estate.

The Civil Revision Petition is dismissed.

Ramesam, J.

Ramesam, J.:—I agree.

N.S. *Appeal and Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD CARSON, LORD SALVESEN AND SIR LANCELOT SANDERSON.

P. C.

Bommadevara Naganna Nayudu Bahadur v. Bommadevara Rajya Lakshmidevi Amma.

Sri Raja Bommadevara Naganna Nayudu Bahadur and another .. *Appellants** (*Defts.*)

v.

Sri Raja Bommadevara Rajya Lakshmidevi Amma Garu .. *Respondent* (*Plff.*).

Hindu Law—Wife living apart from her husband, disentitled to maintenance.

---

*P. C Appeal No. 39 of 1926 4th May, 1928.

6. (1927) I.L.R. 50 M. 948: 53 M.L.J. 890.

P. C.

Bomma-devara Naganna Nayudu Bahadur v. Bomma-devara Rajya Lakshmi-devi Amma.

In a suit brought by a Hindu wife for arrears of maintenance, *held*, on the evidence, that the plaintiff was not justified in living separately from her husband, and as she voluntarily chose to live away from him, she was not entitled to maintenance.

Judgment of the High Court reversed.

Appeal No. 39 of 1926 from a judgment and decree of the High Court, Madras (Spencer, C. J. and Srinivasa Iyengar, J.), dated the 18th August, 1924, reversing a judgment and decree, dated the 22nd December, 1920, of the Additional Subordinate Judge of Ellore.

The facts of the case appear sufficiently from the judgment of their Lordships, and also from the report of the case in the Court below, *see* 87 I.C. 571.

Dunne, K. C. and *K. V. L. Narasimham* for appellants.

De Gruyther, K. C., Parikh and *Subba Row* for respondent.

4th May, 1928. The judgment of their Lordships was delivered by

Lord Carson.

LORD CARSON:—This is an appeal from a judgment and decree, dated the 18th August, 1924, of the High Court of Judicature in Madras, reversing a judgment and decree, dated the 22nd December, 1920, of the Court of the Additional Subordinate Judge of Ellore.

The suit was brought by the respondent (plaintiff) against her husband, the Zamindar of Vallur, hereinafter referred to as defendant 1, to recover twelve years' arrears of maintenance. Shortly after the commencement of the suit defendant 1 died, and the appellants, who are his two sons by another wife, were added as his legal representatives and were made and are defendants 2 and 3 in the suit.

The respondent was married to defendant 1 about the year 1878. She had two sons and one daughter by him. The sons died young. A few years later her husband married Chaya Devi, a younger sister of the respondent, with her consent, and of that marriage there were two sons (the appellants) and three daughters. Another sister of the respondent's was subsequently married to Bhashyakarlu Nayudu, an undivided brother of defendant 1.

It was not in dispute that the respondent left her husband's house in November, 1894, in the absence of her husband, taking with her his children, and accompanied by her sister the said Chaya and the said Nayudu, her husband's brother, and had not

P. C.

Bommadevara Naganna Nayudu Bahadur v. Bommadevara Rajya Lakshmidevi Amma.

Lord Carson.

lived with her husband or in his house as his wife for a period of 23 years before his death. The main question in the action was whether she was justified under the circumstances proved in so leaving her husband's house, and in continuing to remain away for all the intervening years that elapsed until the present suit was brought.

Other questions were raised in the course of the trial as to whether the respondent had waived her right to maintenance and whether she was estopped from claiming it, but as these issues were found in favour of the respondent by both Courts below, they have become immaterial and have not been discussed before this Board.

The Additional Subordinate Judge of Ellore, who heard the case at considerable length on the 22nd December, 1920, dismissed the respondent's claim holding that she had no justification for living separate from her husband during the period for which she claimed maintenance.

On appeal to the High Court of Judicature at Madras the judgment of the Additional Subordinate Judge was reversed by a judgment and order dated the 18th August, 1924, awarding the plaintiff Rs. 43,200 as arrears of maintenance at the rate of Rs. 300 per month for twelve years. From that decree the defendants 2 and 3 have appealed to His Majesty in Council.

The question to be decided is, therefore, solely one of fact and arises in the fourth issue framed for the trial of the action, viz.,

"whether the circumstances mentioned in the plaint are true and whether they justify plaintiff in bringing this action?"

Having regard to the length of time which had elapsed before the present proceedings were instituted and the case attempted to be proved at the trial, it is important to examine not merely the case made by the plaint but certain other proceedings which are on record and in which the plaintiff was involved. The case as put forward in the plaint is as follows:

"About the year 1889 disputes arose between defendant 1 and his younger brother, who demanded partition of the estate. The defendant, with intent to defraud his brother in case of a division of the estate, attempted to suppress valuable properties by converting them into currency notes and by transferring them to Hyderabad For this purpose he engaged a number of subordinates who were ready to assist him in his evil design. Boddu Narasimha Rao was chief among them. As a means of securing their thorough co-operation in his design he offered to give his daughters in marriage to some of them. The plaintiff and her sister protested against such a

course, as the daughters were not willing to accept the matches. About this time the defendant was entirely under the influence of a dancing woman named Mahalakshmi, at whose instance he was already defaming, abusing, beating and otherwise ill-treating his wives, the plaintiff and her sister. Boddu Narasimha Rao made common cause with the defendant and his dancing girl, and all the three conspired against the plaintiff and her sister and the defendant's brother. They made the place so hot for plaintiff and others that they had to flee for their lives from Pangidigudem to Cocanada about November, 1894, after having applied for police protection."

The defendant No. 1 in 1895 took proceedings against the respondent and his second wife, her sister, complaining that, during his absence at Secunderabad, his said wives unlawfully took away his minor children out of his keeping in Pangidigudem without his consent and against his will. In those proceedings the respondent attempted to justify her action on the grounds of the first defendant's gross neglect, ill-treatment and immorality. Although various delays were granted to enable these charges to be proved, the respondent did not produce a single witness, and on the 30th August, 1895, judgment was given by the Subordinate Judge at Ellore ordering the children to be given up to the respondent's husband, defendant 1.

One more important matter on record ought to be considered before approaching the evidence produced at the trial.

When the respondent left her husband's house she was, as already stated, accompanied by her husband's younger brother, with whom, as stated in the plaint, her husband had differences and with whom the respondent apparently took sides. In the year 1898, proceedings were taken by the said brother against the respondent for alleged loans due by her to him, and it is important to observe that, in giving judgment dismissing the suit on the 2nd December, 1898, the Subordinate Judge at Cocanada, in the course of his judgment, said:

"Plaintiff admitted that he was warned by his brother (defendant 1) not to talk to defendants (of whom one was the respondent), but to quit his house at once, and in spite of this warning he brought them away to Cocanada, planning for their exit from Pangidigudem in a very cunning way, as will be seen from his letters . . giving them some hopes of his adopting a son of the defendant and making over to him the property to be received under the partition suit he had laid against their husband."

Bearing these matters in mind, it is necessary now to consider the case made by the respondent at the trial of this action, which took place in 1920. No case was attempted to be proved of the alleged conspiracy to defraud the husband's brother, but

P. C.

Bommadevara Naganna Nayudu Bahadur v. Bommadevara Rajya Lakshmidevi Amma.

Lord Carson.

in her evidence the respondent for the first time, after making various other complaints, deposed as follows:—

"One day, when myself and Chaya Devi Amma were taking our meals, some pills were found in the fish curry. They were thrown to a dog and the dog ate the same and died. We gave up taking our food. Then we got afraid lest we should lose our lives by remaining here and sent word to Cocanada in order to save our lives We sent word to Cocanada to our mother; our mother caused a petition to be presented to the Collector, praying we should be set free."

The learned Trial Judge, who has examined this allegation and the evidence in support of it with great care, having regard to the seriousness of the charge and the time at which it was first made, came to the conclusion that it was proved to be a complete myth. In the 24th paragraph of his judgment he states his reasons for coming to that conclusion, and amongst other matters states as follows:—

"The first defendant's brother was at Pangidigudem when this incident is said to have occurred, and he was a confidant of the plaintiff and of her sister. Yet the plaintiff admitted in her evidence she did not report this incident to the first defendant's brother. She did not make any report to the police about this. Nor did she address any letter to the Raja (i.e. her husband) informing him of the incident. The second defendant and other people who were in Pangidigudem and who ought to have known about the incident if it had really occurred, say that they have never heard of such an incident. This incident was not mentioned in previous litigation, civil and criminal, between the first defendant and his wives I am clearly of opinion that the poison incident has been invented for the purpose of this suit in order to find some justification for plaintiff's continued absence at Cocanada for 23 years. If this incident is rejected as false there could be no other justification for the plaintiff to live away from her husband."

With that conclusion of the learned Subordinate Judge their Lordships agree with the result that it is impossible to rely upon any evidence given by the plaintiff. It is unnecessary to repeat in detail the careful analysis made by the Subordinate Judge of all the evidence and contentions put forward on one side and the other and the various suggestions of demands for maintenance and restoration which took place during the long series of years. It is sufficient to observe that their Lordships are of opinion that there was no real attempt to enforce a claim for maintenance or to procure a return to her husband's house during the long series of years which had elapsed prior to the bringing of this action, and their Lordships agree with the Subordinate Judge when he says in paragraph 29:

P. C.

Bommadevara Naganna Nayudu Bahadur v. Bommadevara Rajya Lakshmidevi Amma.

Lord Carson.

"I have shown in the above paragraphs sufficient facts which must lead to the conclusion that the plaintiff voluntarily lived at Cocanada apart from her husband for a period of 23 years without justification."

It is true that the learned Judges in the High Court of Judicature at Madras took a different view of the facts from that formed by the Subordinate Judge. The learned Chief Justice believed the poisoning story, and states that it "was the immediate occasion for their leaving the protection of his house."

The other learned Judge does not mention the poisoning incident, but finds an excuse from the nature of the evidence given by stating that:

"When the women of a particular family observe a kind of quasi-gosha, as they do in most zamindar families, it is not possible to obtain such direct evidence of ill-treatment or cruelty as may be possible in other cases. Further, the ill-treatment is not likely to be open or brutal, but insidious, and much more galling."

Their Lordships cannot agree with the conclusions of fact come to by the High Court and are satisfied, for the reasons already stated, that the judgment of the learned Subordinate Judge is to be preferred, and they will accordingly humbly advise His Majesty that this appeal should be allowed, that the decree in the High Court of Judicature in Madras of the 18th August, 1924, should be set aside, that the judgment and decree passed by the Court of the Additional Subordinate Judge at Ellore, dated the 22nd December, 1920, should be restored, and that the respondent should pay to the appellants the costs of this appeal and of the appeal to the High Court of Judicature at Madras.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondent: *Douglas Grant* and *Dold.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT :—VISCOUNT SUMNER, MR. AMEER ALI AND SIR JOHN WALLIS.

Ramgopal and others .. *Appellants** (*Defts.*)

v.

Dhanji Jadhavji Bhatia, trading under the name of The Andain Company .. *Respondent* (*Plff.*).

P. C.

Ramgopal v. Dhanji Jadhavji Bhatia.

Indian Contract Act (1872), *S.* 73—*Damages for breach of contract—Remoteness of damage—Loss of profits—Finding of fact of Appellate Court—Credibility of witnesses*

Damages awarded to the plaintiff for breach of contract, *held* (in the circumstances of the present case) not to be intrinsically too remote. "The amount of profit the plaintiff could have made, if the defendants had held to their contract with him, is the amount of the loss, which naturally arose in the usual course of things from their breach of it, which also the parties knew when they made the contract to be likely to result from a breach of it".

In case of a breach of contract, a party claiming damages is bound to take reasonable steps to mitigate his loss (*see* the "Explanation" to S. 73 of the Indian Contract Act, 1872).

On a pure question of credibility of witnesses the Privy Council will not lightly disturb a finding of fact arrived at by the Court of Appeal in India.

Appeal No. 68 of 1927 from a decree of the Court of the Judicial Commissioner, Central Provinces (Messrs. Hallifax and Kotwal), dated the 20th December, 1924, reversing a decree of the Second Additional District Judge of Akola, dated the 20th January, 1921.

The material facts of the case are set out in their Lordships' judgment.

Dunne, K. C.; *Parikh* and *Hyam* for appellants.

Lowndes, K. C. and *Raikes* for respondents.

17th May, 1928. Their Lordships' judgment was delivered by

Viscount Sumner.

VISCOUNT SUMNER :—The respondent, who was the plaintiff in the suit, claimed against the legal representatives of the partners in a firm now dissolved, who are the present appellants, to recover damages for breach of a contract to gin for him in their ginning factory raw cotton, which he contemplated buying and,

*P.C. Appeal No. 68 of 1927. 17th May, 1928.

when ginned, pressed and made up into bales, proposed to sell on the market in Bombay or elsewhere.

At the trial the Second Additional District Judge of Akola decided that the alleged contract was not proved and he dismissed the suit. Thereupon the plaintiff appealed to the Court of the Judicial Commissioner for the Central Provinces. Before the appeal came on to be heard, the Judge was removed from his office for judicial misconduct, not however connected with this case. Accordingly, in the language used by the members of the Judicial Commissioner's Court,

"In the lower Court the plaintiff's suit was dismissed. In this Court it was agreed that no reference should be made to the very long judgment of that Court, for reasons which need not be specified. In this Court it is not seriously contended for the respondents that the contract alleged by the plaintiffs was not duly made and was not a binding contract. That is anyhow very completely proved by the plaintiff's evidence."

In view of this passage it is difficult to see how their Lordships could review a finding of fact thus arrived at. Without dealing with the technical effect which such an agreement might be deemed to have, it is plain that on a pure question of credibility of witnesses, their Lordships have no better competence to determine where the truth lay than the Appeal Court had, if so much, nor was the contention pressed at the bar that they ought to endeavour to do so.

There remains the question whether, as the appellants urged, the damages were intrinsically too remote, and had been awarded on wrong principles. As to this the judgment under appeal says—

"It is further quite apparent that the amount of profit the plaintiff could have made, if the defendants had held to their contract with him, is the amount of the loss, which naturally arose in the usual course of things from their breach of it, which also the parties knew when they made the contract to be likely to result from a breach of it."

The appellants argued that the plaintiff's expected profit was a speculative amount and too remote; that he had little or no cotton to be ginned and bought none; and that in any case he could get no more than the extra cost paid to other mills for ginning such cotton as he tendered to them. With these contentions their Lordships cannot agree.

The contract found by the Court was one made at the beginning of the cotton season, by which during six months or so the defendants were to place their mill at the plaintiff's disposal for half its working time at fixed rates in order to gin cotton,

P. C.

Ramgopal v. Dhanji Jadhavji Bhatia.

Viscount Sumner.

which he contemplated buying and for his part undertook to procure and supply to them. The contract is one of a familiar type. The customer proposes over a prolonged period to buy a raw product from the growers, prepare it and pack it for sale, and dispose of it to purchasers at a profit. In a sense it is and must be a speculative business, but it suits him, by getting the cost of ginning and pressing fixed in advance, to introduce a factor of certainty into his calculations, leaving himself only at the risk of fluctuations in the buying and selling prices of the cotton. But for this he might find the ginning mill advancing prices as the selling price of baled cotton rose, and, his necessities being thus taken advantage of, a substantial part at least of anticipated profit would be intercepted by the mill. On the other hand, to get its overhead and running charges secured, in whole or in part, by a contract guaranteeing half-time employment at any rate, might be an arrangement that would suit the mill very well, leaving it to apply changes of rates to other customers and their cotton. Essentially then an estimate of profits woud be the natural way of measuring the plaintiff's loss and, though only an estimate, it could be correctly formed by the Court, the actual course of markets being known at the date of the trial. So far then the appellants' criticism fails. As to their other point, though no doubt the plaintiff was bound to take reasonable steps to mitigate his loss, the present argument requires that, after the appellants' breach, he should have bought the cotton, which both parties knew he had not yet done, and then have tendered it for ginning to other mills in order to cut down his loss for their benefit to a mere difference in ginning rate. The fact, however, is that this was a case of anticipatory breach. The contract was repudiated almost as soon as it was made, and, the intended operation being thus baulked, the plaintiff was entitled to measure his damages as they then stood and could not be required by the defendants to buy the cotton, which they had announced in advance they would not gin for him. Their Lordships are therefore of opinion that the appeal fails and should be dismissed with costs, and so they will humbly advise His Majesty.

Solicitors for appellants : *Barrow, Rogers* and *Nevill.*

Solicitors for respondents: *Lattey* and *Dawe.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD SHAW, LORD CARSON AND LORD ATKIN.

Maharaja Bahadur Kesho Prasad Singh .. *Appellant** (*Plff.*)

v.

Madho Prasad Singh and others .. *Respondents* (*Defts.*)

P. C.

Kesho Prasad Singh v. Madho Prasad Singh.

Limitation Act (IX of 1908)—Adverse possession—Decree obtained in action to resume possession—Defendant nevertheless continuing in undisturbed possession.

In an action of ejectment brought in 1919, the question was whether the defendants had established a title to the property by adverse possession for over 12 years. It appeared that the plaintiff's predecessor had in the year 1887 obtained (in effect) a decree entitling him to resume possession of the property, but that notwithstanding such decree the defendants and their predecessors continued in possession, and that nothing was done by the plaintiff's predecessors to disturb their (defendants') possession.

Held, that the suit was barred by reason of the adverse possession of the defendants and their predecessors exceeding the period of 12 years†.

Judgment of the High Court affirmed upon a different ground.

Consolidated Appeals No. 74 of 1925 from two decrees of the High Court, Patna (Das and Ross, JJ.), dated the 4th June, 1924, confirming two decrees of the Subordinate Judge of Shahabad, dated the 16th May, 1921, which dismissed two suits instituted by the appellant against the respondents.

The facts of the case are sufficiently stated in the judgment of Mr. Justice Das; *see* I.L.R. 3 Pat. 880.

De Gruyther, K. C. and *Raikes* for appellant.

Upjohn, K. C., Gordon Brown, Mahabir Prasad and *Kurupp* for respondents.

23rd March, 1928. Their Lordships' judgment was delivered by

Lord Shaw.

LORD SHAW:—These are consolidated appeals against decrees of the High Court of Judicature at Patna. They refer to the right of property in two villages, Majhwari and Bhatauli.

With regard to the possession of those villages, it cannot be controverted, and it has been admitted at the Bar, that both villages have been possessed by the respondents for a long period of time (which may be said to have begun in 1887) until the

---

*P.C. Appeal No. 74 of 1925. 23rd March, 1928

†*See* (1922) I.L.R. 46 Mad. 525: 43 M.L.J. 737.—K.J.R.

P. C.

Kesho Prasad Singh v. Madho Prasad Singh.

Lord Shaw.

present day. Any challenge of their title to hold these properties would be excluded by the Limitation Act, it being perfectly clear that their possession far exceeded the period of limitation of 12 years which would affect this case.

Their Lordships think it unnecessary to go into the details of the possession of either party. They are satisfied, however, that the grounds taken by the Subordinate Judge are the true grounds upon which this case should be decided. They do not feel, as at present advised, concerned with the question, somewhat anxiously discussed, of merger by the High Court. They think these things are irrelevant to the true issue, which is one of adverse possession or no adverse possession.

Upon that subject a convenient date is the date 1887. It turned out that at that time the Maharaja was desirous to resume possession of the estates which were the subject of grant, including the two villages in question. At that juncture a certain widow was in possession, and the allegation was that she was entitled to these two villages by reason either of a gift or some deed of arrangement made by the Maharaja himself. That did not prevent him, however, from taking an action to resume possession. He accordingly obtained his decree, but having obtained his decree, nothing was done with regard to the possession of the villages of the respondents, and it is not denied that the respondents and their predecessors did continue, notwithstanding that decree to possess, as they have done to this day, the two villages in question.

There might be another date from which limitation might run, namely, 1864. More contentious matter might arise with regard to that, but with regard to the 1887 date and the possession from that time, the case is plain and has been clearly and correctly dealt with by the Subordinate Judge. Their Lordships will humbly advise His Majesty to refuse the appeal with costs.

Solicitors for appellants: *Watkins* and *Hunter*.

Solicitors for respondents: *Douglas Grant* and *Dold*.

K.J.R. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE MADHAVAN NAIR.

Perumal Pillai .. *Petitioner* (1*st Deft.*)

v.

Perumal Chetty and another .. *Respondents* (*Plffs.* 2 *and* 3).

F. B.
Perumal Pillai
v.
Perumal Chetty.

Civil Procedure Code (*V of* 1908), *O.* 22, *R.* 3, 4 *and* 10—*Preliminary decree in a mortgage suit—Death of plaintiff subsequent to—Legal representative not brought on record within three months—Suit if abates—Application for setting aside abatement after three months—Order by Court that suit did not abate—Appeal—Revision—Civil Procedure Code, O.* 43 *R* 1, *cl.* (*c*).

Order 22, Rules 3 and 4 of the Civil Procedure Code do not apply to cases of death after the passing of the preliminary decree in a suit.

Subbarayudu v. *Ramadasu,* (1921) I.L.R. 45 Mad. 872 : 42 M.L.J. 301 overruled.

Lachmi Narain Marwari v. *Balmakund Marwari,* (1924) L R. 51 I.A. 321 : I.L.R. 4 Pat. 61 : 47 M.L.J. 441 (P.C) and *Chapman* v. *Day,* (1888) 48 L.T. 907 referred to.

Per Wallace, J. (in the Order of Reference to a Full Bench) :—Subsequent to the passing of the preliminary decree in a mortgage suit, the plaintiff died. A person who claimed the mortgage right by virtue of a registered will by the plaintiff applied to the Court, more than three months after the date of the plaintiff's death, for setting aside the abatement of the suit The Court held that O. 22, R. 3 did not apply as the death of the plaintiff was subsequent to the passing of the preliminary decree but that O. 22, R. 10 applied and that therefore the application was not barred by limitation. The judgment-debtor preferred a Civil Revision Petition to the High Court A preliminary objection was raised that no revision lay.

Held, that the order of the lower Court was not appealable as the order was merely that there had been no abatement and the lower Court did not purport to give or refuse to give leave to continue the suit, and therefore the Civil Revision Petition was maintainable.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Palni, dated 1st August 1925, and passed in I. A. No. 159 of 1925 in O. S. No. 587 of 1920.

[This petition first came on for hearing on 20th April, 1927, before his Lordship Wallace, J.]

N. Swaminathan for petitioner.

P. R. Srinivasan for *P. N. Appuswami Aiyar* for respondents.

---

*C.R.P. No. 1216 of 1925. 9th February, 1928.

F. B.

Perumal Pillai v. Perumal Chetty.

The Court made the following

ORDER:—The preliminary decree in a mortgage suit was passed on 18th November, 1921. The plaintiff died on 25th February, 1922. On 17th February, 1925, the respondent in the Civil Revision Petition put in an application under section 151, Civil Procedure Code, and section 5 of the Indian Limitation Act, praying that the abatement of the suit be set aside. He claims the mortgage right by virtue of a registered will by the original plaintiff bequeathing it to him. The judgment-debtor's contention was the suit had abated three months after the plaintiff was dead and cannot now be revived. The District Munsif held that Order 22, Rule 3 did not apply, but Order 22, Rule 10, that the suit was still pending and that the respondent's application was in order and not barred by limitation. The 1st defendant has put in this Civil Revision Petition contending that the District Munsif has erred in law.

The respondent raised a preliminary objection that no Civil Revision Petition would lie because the District Munsif has purported to act under Order 22, Rule 10 and orders under that rule are appealable and that since an appeal lies no right to come up in revision can be admitted. To this the petitioner rejoins that as the District Munsif's order is merely that there has been no abatement and does not purport to give or refuse to give leave to continue the suit, no appealable order has been passed. I think this contention must prevail. If the matter had been taken up on appeal, an Appellate Court might very well have refused to entertain it on the ground that no order of an appealable nature had been passed. I overrule the preliminary objection.

On the merits, the decision must turn on the question whether or not the suit did abate, three months after the death of the plaintiff, or, as the question presents itself in this case, whether or not a suit can abate or will abate after a decree therein has been passed. There is a direct ruling of this Court on very similar facts in *Subbarayudu* v. *Ramadasu* [1] by a Bench which holds that when a preliminary decree in a mortgage suit has been passed and the plaintiff dies thereafter, an application by his legal representative to be brought on record must be made under Rule 3 and not Rule 10 of Order 22. This ruling has been followed—without discussion—by another Bench in *Natesa Pillai* v. *Kannammal*.[2] Respondent contends that this

1. (1921) I.L.R. 45 M. 872: 42 M.L.J. 301.
2. (1923) 46 M.L.J. 181.

F. B.

Perumal Pillai v. Perumal Chetty.

ruling requires reconsideration and requests me to refer the matter to a Bench. *Subbarayudu* v. *Ramadasu*[1] refers to a ruling in *Bhugwan Das Khettry* v. *Nilkanta Ganguli*,[3] a ruling under the old Code, where it was held that section 365 (corresponding to Order 22, Rule 3) applies olny in the case of the death of a plaintiff before decree. I do not myself find that case of much assistance, since I am not able to accept the general principle there laid down that the right to sue may continue even after a final decree. I think it is difficult to maintain that a right to sue continues after a suit has come to an end by a final decree. After the final decree the right to sue has been transformed into a right to execute and by Rule 12 of Order 22, Rule 3 does not apply to execution proceedings. To allow an application of Rule 3 even after a final decree has been passed, would seem under the new Code at least, if not under the old Code, to contradict Rule 12. On the other side I have been referred to a ruling of the Nagpur Judicial Commissioner reported in *Tukaram* v. *Tukaram*[4] and, as at present advised, I am inclined to agree with the arguments therein set out. An argument put forward by the respondent in support of that view is that Rule 9 (1) of Order 22 implies that a cause of action does not ordinarily come to an end when a suit abates, since it was necessary to lay down specifically that no fresh suit on the same cause of action is maintainable when a suit has abated. Now a cause of action does not persist beyond the decree in that action, and therefore equally an abatement does not come into being after a decree has been passed. Now, if there is an abatement after decree, the cause of action is continuing after the decree and could be sued on in a separate suit. This would produce an anomalous result. To prevent this result, Rule 9 had to be enacted. Beyond this, however, if the cause of action as such is terminated by the decree, it would follow that the right to sue on that cause of action likewise comes to an end, even though for certain purposes the suit continues. In that view Order 22, Rule 3 would not apply to a case in which a preliminary decree has been passed and the only rule applicable would be Order 22, Rule 10. Under the old Code that certainly would have been the position, and under the old Code the suit would never have abated since the one and only decree in it would have been passed.

1. (1921) I.L.R. 45 M. 872: 42 M.L.J. 301.
3. (1904) 9 C.W.N. 171.
4. (1920) 64 I.C. 307: 17 N.L.R. 81.

F. B.

Perumal Pillai v. Perumal Chetty.

It is further contended by the respondent that Order 22, Rule 3 cannot apply because he is not a legal representative, being merely a legatee, but that argument would hardly help him if the suit had abated because the true legal representative did not apply in time under Rule 3. So this point is not different from the one already dealt with.

For the reasons I have given I am of opinion that the ruling in *Subbarayudu* v. *Ramadasu*[1] does require some reconsideration and I comply with the request of the respondent and refer this case to a Bench for decision, or reference, if it thinks fit, to a Full Bench.

[This Civil Revision Petition came on for hearing on 31st October, and 7th November, 1927, before their Lordships Sir C. V. Kumaraswami Sastriar, *Kt.*, and Wallace, JJ.].

B. V. Viswanatha Aiyar for *N. Swaminathan* for petitioner.

C. S. Venkatachariar for *P. N. Appuswami Aiyar* for respondents.

The Court made the following.

ORDER OF REFERENCE TO A FULL BENCH.—The question for decision in this revision petition is whether Order 22, Rule 3, Civil Procedure Code, applies to a case where a preliminary decree has been passed in a mortgage suit and the decree-holder dies subseqent to the passing of the preliminary decree and before the final decree is passed. The facts are shortly these:—

The preliminary decree in the motgage suit was passed on the 18th of November, 1921. The plaintiff died on the 25th of February, 1922. On the 17th of February, 1925 the respondent in the Civil Revision Petition put in an application under section 151, Civil Procedure Code, and section 5 of the Indian Limitation Act praying that the abatement of the suit be set aside. He claims the mortgage right by virtue of a registered will by the original plaintiff bequeathing it to him. The judgment-debtor's contention was that the suit had abated three months after the plaintiff died and cannot now be revived. The District Munsif held that Order 22, Rule 3 did not apply, but Order 22, Rule 10, that the suit was still pending and that the respondent's application was in order and not barred by limitation. The 1st defendant has put in this Civil Revision Petition contending that the District Munsif has erred in law. We are inclined to hold that Order 22, Rule 3 does not apply to cases where

1. (1921) I.L.R. 45 M. 872: 42 M.L.J. 301.

F. B

Perumal Pillai v. Perumal Chetty.

the law requires successive decrees to be passed and where the death of a party occurs after the passing of the preliminary decree.

The preliminary decree for sale in a mortgage suit declares the amount due to the plaintiff on account of principal and interest and costs calculated up to the date of the decree and where interest is payable declares the rate of interest to be paid until realization. Then it says that if the defendant pays the amount so decreed into Court on a particular date, the plaintiff should deliver the documents and if required transfer the property to the defendant and, if necessary, give possession. In default of such payment it directs the property to be sold. It then gives liberty to the plaintiff to apply for a personal decree for the balance if any.

It will thus be seen that all the questions in issue between the parties are settled and after the preliminary decree is passed the only question at the time of the passing of the final decree is whether there has been payment as directed. As regards all other matters the cause of action has become merged in the preliminary decree. If the cause of action as such is terminated by the decree it follows that the right to sue on this cause of action likewise comes to an end even though for certain purposes the suit continues. In this view Order 22, Rule 3 would not apply to a case in which a preliminary decree has been passed and the only rule applicable will be Order 22, Rule 10.

Where a preliminary decree has been passed, it is difficult to see how the death of a party subsequent to the passing of the preliminary decree can wipe out the decree if a legal representative was not brought on record within time and enable the Court to dismiss the suit. In *Lachmi Narain Marwari* v. *Balmakund Marwari*[5] their Lordships of the Privy Council observe:

"After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside."

The preliminary decree in that case for partition had been passed and the case was sent back to the Subordinate Judge by the High Court to pass a final decree. As the plaintiff failed to appear on the day appointed by the Subordinate Judge, he dismissed the suit. Their Lordships of the Privy Council set

5. (1924) L.R. 51 I.A. 321: I.L.R. 4 Pat. 61: 47 M.L.J. 441 (P.C.).

F. B.

Perumal Pillai v. Perumal Chetty.

aside the order on the ground that as the preliminary decree had been passed, it could not be affected by any subsequent default of appearance. In *Bhatu Ram Modi* v. *Fogal Ram*[6] it was held following the decision of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari*[5] that where a decree for mesne profits had been passed and an application was made for ascertainment of mesne profits, it is not competent to a Court at any stage to dismiss the application, it being beyond its power to dismiss a claim which has already been decreed. In *Chandra Shekhar* v. *Amir Begam*[7] the learned Judges observe that after the decision of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari*[5] they are bound to hold that the provisions of Order 9, Rule 3 could not apply after the passing of the preliminary decree so as to entail the dismissal of the whole suit.

It seems to us difficult in principle to distinguish the dismissal of a suit after a preliminary decree has been passed for default of appearance under Orders 9 and 17 and abatement by not bringing a party on record under Order 22 in so far as the effect of such an order on the preliminary decree is concerned. We think where a cause of action has been merged wholly or in part by a decree, it follows that the right to sue on that cause of action comes to an end to the extent to which it has merged in the decree even though the suit may continue for certain other purposes. It is difficult to see how the suit can be said to continue in so far as it relates to that portion of the claim which has been adjudicated upon and in respect of which a decree has been passed. Any abatement can only apply to such part of the cause of action as has still to be adjudicated upon and in respect of which a separate decree has to be passed. In this view it seems to us Rule 3 could not apply to cases where successive decrees are required to be passed by the Court and the death of party occurs at a stage subsequent to the passing of the preliminary decree. We think Rule 3 contemplates the usual class of cases where matters in dispute are adjudicated upon once for all by a decree and where prior to that date one of the parties dies. In *Subbarayudu* v. *Ramadasu*[1] it was held by Ayling and Venkatasubba Rao, JJ., that Order 22, Rule 3 applies to mortgage suits even

5. (1924) L.R. 51 I.A. 321. I.L.R. 4 Pat 61. 47 M.L.J. 441 (P.C).

6. (1925) I.L.R. 5 Pat 223.

7. (1927) I.L.R. 49 All. 592.

1. (1921) I.L.R. 45 M. 872: 42 M.L.J. 301.

after the passing of the preliminary decree on the ground that the suit should be treated as pending till the final decree is passed and Rule 3 in terms applies to a pending suit. This decision was followed without discussion by Spencer and Odgers, JJ., in *Natesa Pillai* v. *Kannammal.*[2] In *Manujendra Dutt Chowdhury* v. *Jnan Ranjan Somaddar*[8] it was held that the provisions of Order 22, Rule 4 apply both before and after the passing of the preliminary decree. The learned Judges were of opinion that although under the old Code it was held that where a preliminary decree had been passed and one of the parties subsequently died, the matter did not fall under section 368 but under section 372, still as the words "before decree" are omitted in Rule 4 it made a difference in the present Code. Greaves, J., observed that though he was first inclined to the view that the first four rules of Order 22 apply to deaths occurring before a preliminary decree had been passed, yet he was constrained to follow *Bhutnath Jana* v. *Tarachand Jana.*[9] In *Bhutnath's* case the learned Judges were of opinion that until the final decree was passed following the preliminary decree in a mortgage suit, the proceedings must be treated as proceedings in a pending suit and that the consequence was that though a decree-holder can apply within three years for making a preliminary decree final, yet if a judgment-debtor dies he will have to come in within six months (it is now 90 days under the new Code) to make his heirs liable. In *Ali Bahadur Beg* v. *Rafiullah*[10] the view of the Madras High Court was followed. As the decision of the Privy Council in *Lachmi Narain Marwari* v. *Balmakund Marwari*[5] was passed subsequent to the decisions of this Court in *Subbarayudu* v. *Ramadasu*[1] and *Natesa Pillai* v. *Kannammal,*[2] we are of opinion that these cases require reconsideration.

We refer the following for the decision of a Full Bench:

"Whether Order 22, Rules 3 and 4, Civil Procedure Code, apply to cases of death after the passing of a preliminary decree."

[This Civil Revision Petition came on for final hearing on 3rd February, 1928 before a Full Bench constituted as above.]

S. Varadachariar and *B. V. Viswanatha Aiyar* for N. *Swaminathan* for petitioner.—The question of abatement is not

2. (1923) 46 M.L.J. 181
5 (1924) L.R. 51 I.A. 321 I.L.R 4 Pat 61: 47 M.L.J. 441 (P.C).
8. (1925) 87 I.C. 818.
9. (1920) 25 C.W.N. 595.
10 (1926) I L. R. 49 All. 310

F. B.

Perumal Pillai v. Perumal Chetty.

the same thing as merger. It assumes that the right is there, only it is unenforceable because of the statutory bar. It is something like the bar imposed by the statute of limitation regarding execution of decrees after the prescribed period. It is not correct to say that a final decree merely works out the rights under the preliminary decree. Except in the case of simple mortgages, the preliminary decree merely declares the right of the parties; everything has to be done subsequently. There is no distinction between preliminary and final decrees in Order 22, Rules 3 and 4, Civil Procedure Code. Also Rule 12 of Order 22 refers only to two stages, namely the stage of suit and that of execution; there can be no intermediate stage. *Subbarayudu* v. *Ramadasu*[1] is correctly decided. *Lachmi Narain Marwari* v. *Balmakund Marwari*[5] is not a case under Order 22. In that case the dismissal of the suit was held to be wrong. Here there need be no formal order of abatement and consequently there is no necessity to dismiss the suit.

C. S. Venkatachariar with *P. N. Appuswami Aiyar* for respondents.—The expressions "right to sue" and "cause of action" are synonymous. In a mortgage suit the cause of action is merged in the preliminary decree and the drawing up of the final decree is a formal process. The death of a party after the cause of action has merged in a decree is immaterial. (*Chapman* v. *Day*[11] and *Gopal* v. *Ramachandra*.[12]) The principle underlying *Lachmi Narain Marwari* v. *Balmakund Marwari*[5] is applicable.

B. V. Viswanatha Aiyar in reply.—The question is not whether the cause of action has merged in the preliminary decree but whether the right to sue has come to an end with the passing of such a decree. The cases wherein parties have been added after the preliminary decree proceed on the ground that the suit is pending down to the later point of time. If the right to sue subsists after the preliminary decree, Rule 3 and 4 of Order 22 will clearly apply.

Coutts Trotter, C. J.

The Court expressed the following

OPINION: *The Chief Justice.*—The short point in this case arises in this way. The plaintiff obtained a preliminary decree in

1. (1921) I.L.R. 45 M. 872· 42 M.L.J. 301.
5. (1924) L.R. 51 I.A. 321: I.L.R. 4 Pat. 61: 47 M.L.J. 441 (P C).
11. (1883) 48 L.T. 907.
12. (1902) I.L.R. 26 B. 597.

F. B.

Perumal Pillai v. Perumal Chetty.

Coutts Trotter, C. J.

a mortgage suit on the 18th November, 1921. He then died on the 25th February, 1922, before a final decree had been passed. No application had been made or acceded to within three months of the plaintiff's death to add his legal representatives to the record. It is contended that in the circumstances the suit must be deemed by the provisions of Order 22, Rule 3, to have abated. The question referred to us is whether on a proper construction of the authorities that is the true position. The most illuminating principle which should guide us appears to me to be contained in the case of *Chapman* v. *Day*[11] tried before Pollock, B., and Justice Lopes, J., and the passage that appears to put it very shortly is contained in the judgment of Lopes, J.

"It is said that, the defendant having died, the maxim *Actio personalis moritur cum persona* applies. I think it does not apply in such a case as this. I think 'action' means 'right of action' and if that is the true way of looking at it, the right of action here had been determined before the death of the defendant."

Applying that principle, it would appear that the right of action as there defined by the learned Judge is determined by a preliminary decree because the final decree is only by way of working out in detail the principles laid down and determined in the preliminary decree. The decision in *Chapman* v. *Day*[11] has been followed and applied in this country in the case of *Gopal* v. *Ramachandra*[12]. There was a difference of opinion at the outset, then Crowe, J., was called in and he based his judgment on the decision in *Chapman* v. *Day*[11]. In Madras a contrary view seems to have been taken and there is no doubt about it that *Subbarayudu* v. *Ramadasu*[1] is a definite position adverse to the respondents in this reference. The learned Judges who referred this case to us thought that by implication the authority of *Subbarayudu* v. *Ramadasu*[1] had been very much shaken by the Privy Council's decision in *Lachmi Narain Marwari* v. *Balmakund Marwari*[5]. Without discussing that case in detail, it seems clearly to proceed on the basis that a preliminary decree determines the rights of the party and that the rest, whatever it be, assessment of damages, working out of accounts and so forth is a mere subsequent defining of the effect that is to be given to the declaration of right which is contained and finally determined (subject, of course, to appeal) in the preliminary decree. We think

(1883) 48 L.T. 907.

12. (1902) I.L.R. 26 B. 597.

1. (1921) I.L.R. 45 M. 872: 42 M.L.J. 301.

5 (1924) L.R. 51 I.A. 321: I.L.R. 4 Pat. 61: 47 M.L.J. 441 (P.C).

F. B.

Perumal Pillai v. Perumal Chetty.

Coutts Trotter, C. J.

that the principle underlying that case where after preliminary decree the plaintiff did not appear when the case came on for final decree and the case was struck out, a course which the Privy Council disapproved on the grounds we have mentioned, applies by analogy just as much to a case where a man does not appear because he cannot appear since he is dead. In our opinion all that is really important in these matters is to have a settled rule of practice. The present case is obviously a *casuo omissus* from the Code of Civil Procedure and probably nobody had thought of providing for it. In these circumstances all that is important is that we should endeavour to formulate the most logical rule we can and follow as best we may the nearest analogies. We therefore think that *Subbarayudu* v. *Ramadasu*[1] is no longer good law and we must answer this reference by saying that in our opinion Order 22, Rules 3 and 4 do not apply to the present state of circumstances. The case will be referred back to the Division Bench with that opinion.

N.S. *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Selvarayan Samson, by agent A. Chinnasamy Udayar .. *Appellant** (*Petr. 1st Deft.*)

v.

S. Amalorpavanadham .. *Respondent* (*Respt. Plff.*).

Selvarayan Samson v. Amalorpavanadham.

Civil Procedure Code (V of 1908), Sch. II, S 20—Application filed under, and registered as a suit—Ex parte decree in—Refusal to set aside—Order of—Appeal from—Maintainability—Order 43, R. 1 (d), S 104 (1) (f)—Order allowing appeal—Effect of.

An appeal lies against an order refusing to set aside an *ex parte* decree passed in an application filed under S 20 of Sch II of Civil Procedure Code and registered as a suit. The order allowing such an appeal involves setting aside not only the *ex parte* decree but the order filing the award—in fact all the proceedings after the non-appearance of the defendant.

Appeal against the order of the Court of the Subordinate Judge of Cuddalore, dated the 22nd September, 1924, in I.A. No. 243 of 1924 in O.S. No. 49 of 1923.

---

*C.M.A. No. 243 of 1925. 8th December, 1927.

1. (1921) I.L.R. 45 M. 872: 42 M.L.J. 301.

Selvarayan Samson v. Amalorpavanadham.

Ramesam, J.

C. A. Seshagiri Sastri for appellant.

A. Krishnaswami Aiyar and *S. Henry Victor* for respondent.

The Court delivered the following

JUDGMENT. *Ramesam, J.*—This is an appeal against an order refusing to set aside an *ex parte* decree. The decree itself was passed in an application filed under section 20 of Sch. II of the Code of Civil Procedure and registered as a suit. a suit.

The case originally stood posted for the 23rd July, 1924. It was then adjourned to 30th July. On that date the defendant was absent and the Court proceeded *ex parte* and passed a decree in accordance with the award. Afterwards, on the 11th August, 1924, the defendant filed the present application for setting aside the *ex parte* decree. The Subordinate Judge of Cuddalore refused to set aside the *ex parte* decree by the order dated 22nd September. The defendant filed the present appeal.

The respondent's vakil takes the preliminary objection that no appeal lies. The appellant meets this contention in two ways. Firstly, he relies on *Nihal Singh* v. *Khushhal Singh*[1] and argues that this is a case open to appeal within the meaning of those words as used in Order 43, Rule 1 (*d*), whereas the respondent contends that this is not a case open to appeal, because when a decree is passed in a case of this kind no appeal lies except in so far as it is in excess of the award and in this particular case the decree that was passed was not in excess of the award. He, therefore, contends that this is not a case open to appeal. In *Nihal Singh* v. *Khushhal Singh*,[1] which is a decision of Piggott and Walsh, JJ., Piggott, J., says that apart from the decree a case under section 20 of Schedule II may be regarded as a case open to appeal, because when an order is made filing or refusing to file the award, an appeal lies under section 104 (1) (*f*) of the Code of Civil Procedure. No doubt Piggott, J., gives a further reason for holding that the case is one open to appeal, namely, that though an appeal against a decree may not lie in certain circumstances, it will lie in certain other circumstances and, therefore, the case may be regarded as one open to appeal. So far as the ground of Piggott, J., is concerned, it is in conflict with thereasoning of Das and Ross, JJ., in *Raghunath Rai Dilsuk Rai* v. *Bridhi Chan Sri Lal*,[2] but the actual case before the Patna High Court is not one arising under

1. (1916) I.L.R. 38 All 297.
2. (1924) I.L.R. 3 Pat. 839.

Selvarayan Samson v. Amalorpavanadham.

Ramesam, J.

section 20 of Schedule II. It was a case of reference through Court followed by an award. Section 104 (1) (*f*) does not apply to such a case. This fact is enough to distinguish the two cases and the case in *Raghunath Rai Dilsuk Rai* v. *Bridhi Chan Sri Lal*[2] does not stand in the way of the appellant in the case before us. Though I am personally inclined to agree with the second ground of Piggott, J., also, it is unnecessary to pursue the matter further. The first ground is enough for us to hold that the present appeal lies.

It cannot be said that the words "case open to appeal" should be necessarily construed only with reference to the decree and to no other order. The appellant also argues that, even if the above argument is not tenable, the appellant could have filed an appeal against the order filing the award. In the present case the order filing the award and the order passing a decree were both contained in the same order dated the 30th July. The decision in *Sitaramaiya* v. *Pichaiya*[3] is an authority for holding that the two parts can be separated and though there may be no appeal against the decree itself, an appeal can be filed against the earlier portion of the order which directs that the award should be filed. It is true that the present appeal is not filed in the form of an appeal against the order filing the award, but having regard to the fact that from 11th August, 1924 up to this date, the appellant has been pursuing *bona fide* another proceeding for obtaining the same relief, if it is necessary for us to take this course of action, we will be inclined to excuse the delay and allow the appellant to convert the present appeal into an appeal against the order filing the award and proceed with the case.

Another argument of the learned vakil for the respondent requires to be noticed. He contends that if we are inclined to hold that the appeal lies and proceed to set aside the *ex parte* decree, there will be an anomalous result. He says that while the decree is set aside the order filing the award remains, but if the order filing the award remains valid, the only course open to the Court is to follow it up by a decree and therefore it is meaningless to set aside the decree while leaving the order filing the award in force. The reply to this is that there is really no such anomaly as apprehended by the learned vakil for the respondent. If we interfere in the case, we will interfere as will appear lower down, on the ground that the appellant has

2. (1924) I.L.R. 3 Pat. 839. 3. (1911) 21 M.L.J. 1005.

Selvarayan Samson v. Amalorpavanadham. — Ramesam, J.

shown sufficient reason for his absence on the 30th and all proceedings subsequent to the stage of his non-appearance on that day do not bind him. Therefore not only the decree but also the order filing the award are not binding on him. When we set aside the *ex parte* decree, we really set aside all proceedings from the stage of his non-appearance. Therefore, there is no such anomaly as the learned vakil for the respondent supposes.

Another contention of the respondent's vakil is that Order 43, Rule 1 (*d*) does not help the appellant because Order 9, Rule 13 applies only to decrees *in suits*. He contends that though there is a decree here, it is not a decree in a suit. Though section 20 of Schedule II of the Code of Civil Procedure directs that the application should be numbered as a suit, he contends that still it is not a suit. For this contention he relies on *Rajmal Girdharlal* v. *Maruti Shivram*.[4] In that case it was held that for the purpose of section 11 of the Code of Civil Procedure, an order refusing to file an award is not *res judicata* in a later regular suit on the ground that the earlier proceedings was not a suit. It is unnecessary to consider that decision now. That is a decision for the purpose of section 11 only. We are satisfied that for the purpose of Order 9, Rule 13, this is a suit and there is a decree. Order 9, Rule 13 applies. We overrule the preliminary objection and hold that an appeal lies.

Coming to the merits, the facts are very simple. There were floods in the Cuddalore and Tanjore Districts in the month of July, 1924. On the 23rd July, the defendant went to Mayavaram, and through his vakil there, who was acting as the legal adviser in connection with this matter, sent a telegram to the Subordinate Judge, Cuddalore, saying that he was unable to attend Court and praying for an adjournment of the suit. The suit was adjourned to 30th July but the fact was never communicated to the party. The party wrote a letter to his vakil at Cuddalore along with the telegram to the Court, but he never got any reply. His statement in the affidavit that he never knew to what date the suit was adjourned must be accepted. It may be that if he took more diligent steps than those he has actually taken it was possible for him to ascertain the exact date to which the case was adjourned but the facts of the case are so peculiar that we will not be justified in looking forward

4. (1920) I.L.R. 45 B. 329

Selvarayan Samson v. Amalorpavanadham. — Ramesam, J.

for such extraordinary diligence. We think that the facts of the case are such that the Subordinate Judge might well have set aside the *ex parte* decree and restored the suit. We therefore allow this appeal and set aside the order of the Subordinate Judge refusing to set aside the *ex parte* decree. I have already observed that this order involves setting aside not only the *ex parte* decree but the order filing the award—in fact all the proceedings that took place after the non-appearance of the defendant. The costs in the Court below will abide the result and in the appeal the respondent will pay the appellant's costs.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Mt. Amir Bi .. *Plaintiff**

v.

Abdul Rahim Sahib and others .. *Defendants.*

Mt. Amir Bi v. Abdul Rahim Sahib.

Letters Patent (Madras), clause 12—Suit for land—Administration suit—What amounts to—Ancillary relief of partition—Effect—Power of Court to adjudicate upon title to immoveable property outside its jurisdiction.

An administration suit is not a suit for land within the meaning of clause 12 of the Madras Letters Patent.

In an administration suit, the High Court can adjudicate upon title to immoveable property outside its jurisdiction.

A Mahomedan who was trading in Madras died leaving large assets consisting of moveables within the city and a few items of immoveable property wholly outside the jurisdiction of the Madras High Court. His widow brought a suit alleging that her husband left to his credit in the firm at Madras, of which he was a partner, about a lakh of rupees, that Mahar was payable to her and that it formed the first charge on the estate, that her husband's property was divisible only among herself and her children, as her husband's children by his predeceased wife had released their rights to the estate, and that, should the Court find that the release was not binding upon them, they should be directed to restore to the estate the benefits received by them under that release. On these allegations the plaintiff prayed that it may be declared that her husband's children by his pre-deceased wife are not his heirs, that her Mahar may be paid, that an account may be taken of the properties and assets left by her husband and available for division, that his estate may be administered under the decree of Court, that if the Court should be of opinion that the release was not binding on her husband's children by his pre-deceased

---

*C.S. No. 81 of 1927. 21st March, 1928.

wife, they should be directed to bring back the benefits received under the release and that the estate may be divided among the rightful heirs according to their shares under the law.

Held, that this suit was not a suit for partition, pure and simple, but was one for administration, though one of the reliefs claimed was that the property should ultimately be partitioned.

Meaning of the word "administration" and the functions of the Court in an administration suit pointed out.

S. Doraiswami Aiyar and *V. C. Gopalaratnam* for plaintiff.

A. Suryanarayana, D. Audinarayana, T. C. A. Bhashyam, R. Sundararajan, T.C.A. Thirumalachari and *N. Babu Rao* for defendants.

The Court delivered the following

JUDGMENT :—A preliminary issue has been raised :

"Has the Court jurisdiction to try the suit?"

This involves a consideration of three points:

(1) Is this an administration suit?

(2) Is an administration suit a suit for land?

(3) If it is held that it is not, can the Court, in such a suit, where the land is wholly outside jurisdiction, decide questions of title to such land?

I shall first deal with the question: "Is this an administration suit?" Abdul Razaak Saheb, a Mahomedan, who was trading in Madras, died in 1920, leaving large assets consisting of moveables within the city and a few items of immoveable property wholly outside this Court's jurisdiction. In this suit, which his widow has brought, she asks that the extent of Abdul Razaak's property may be ascertained, that his outstandings may be realised, that his estate may be administered, that her mahar may be paid and that the residue divisible among his heirs may be divided according to their shares under the law. These are, in short, the reliefs claimed in the plaint. Her children, as the heirs of their deceased father, have been impleaded as defendants 3 to 6. The plaintiff's case is, that the children of Abdul Razaak by his first wife, who predeceased him, released, during his lifetime, their right to the estate and that they and their heirs are not therefore entitled to any share of the property left by him. The 7th defendant is Abdul Razaak's son by his deceased first wife. At his death, Abdul Razaak left also a daughter by that wife, who died subsequently leaving defendants 8 to 17 as her heirs. Defendants 7 to 17 do not admit the plaintiff's allegation that they are not entitled to a share in the estate,

Mt. Amir Bi
v.
Abdul Rahim
Sahib.

With these observations, I shall now examine the plaint. In paragraph 6, the plaintiff says that her husband died leaving to his credit in the firm at Madras, of which he was a partner, a very large sum, about a lakh of rupees. In paragraph 11 she claims that mahar is payable to her and that it forms the first charge on the estate. In paragraph 12, she says that Abdul Razaak's property is divisible only among herself and her children, namely, defendants 3 to 6. Paragraphs 13 to 15 deal with the effect of the release executed by the children of Abdul Razaak by his predeceased wife. The plaintiff claims that, should the Court find that the release is not binding upon them, they should be directed to restore to the estate, the benefits received by them under that release. I may here incidentally mention that they obtained under the release certain immoveable properties outside the jurisdiction of this Court. Having made these allegations the plaintiff prays :

(1) That it may be declared that defendants 7 to 17 are not the heirs of Abdul Razaak;

(2) That her mahar may be paid;

(3) That an account may be taken of the properties and assets left by Abdul Razaak and available for division;

(4) That his estate may be administered under the decree of Court;

(5) That if the Court should be of the opinion that the release is not binding on defendants 7 to 17, they should be directed to bring back the benefits received under the release; and

(6) That the estate may be divided among the rightful heirs according to their shares under the law.

It has been contended for the defence that this is not an administration suit. I find it very difficult to follow this argument. The plaint raises these various questions :

What were the properties left by the deceased Abdul Razaak?

Who are the parties entitled to his estate?

What is his property now available for division?

This, surely, is not a suit for partition, pure and simple. One of the reliefs claimed, no doubt, is that the property should ultimately be partitioned; but that does not make the suit a partition suit. Administration means management of the deceased's estate. The Court is requested to assume its management, to take upon itself the functions of an executor or administrator and admi-

nister the estate. The administration of a deceased's estate consists of collection and preservation of assets, payment of debts and legacies, acts in respect of adverse claims to assets, dealings with creditors or legatees and distribution finally among the heirs or next-of-kin. These are the functions of an administrator, and the object of an administration suit is to have the estate administered under a decree of Court; in other words, the Court itself assumes the function of an administrator and administers the estate.

Order 20, Rule 13, Civil Procedure Code, deals with administration suits. It says that the Court shall first pass a preliminary decree directing accounts and inquiries. It further provides that all persons with claims may come in under that decree and establish their rights. It postpones the making of the final decree till after these steps have been taken. Appendix A, Civil Procedure Code, gives the forms in regard to various types of administration suits (Forms 41 to 44). Similarly, Appendix D sets forth forms of decrees. Turning to Form No. 17, in a suit by the next-of-kin, an enquiry is made, and account taken, of what share, if any, the plaintiff is entitled to, as the next-of-kin of the intestate.

It is thus perfectly clear that it is open to a litigant in India claiming a share of a deceased's estate to file an administration suit. As a result of the administration by the Court, it may ultimately direct the residue of the property to be given over, either to the sole heir (where there is only one), or to be distributed among several heirs (where there are several). Thus, partition may be an incident, but is not a necessary incident of the administration of a deceased person's estate. In this particular case, as there are several heirs, it has become necessary for the plaintiff to ask for a partition; but this is a mere accident.

Mr. S. Doraiswamy Aiyar for the plaintiff has cited several cases which decide that such a suit is an administration and not a partition suit. *Khatija* v. *Shekh Adam Husenally*[1] is a suit of this description. It is noticeable that in that case the deceased died more than 35 years previous to the suit. There were no funeral charges, no legacies, no debts that had to be paid and no outstandings that had to be collected (*see* p. 547). The suit was for an account in respect of a Mahomedan's estate and partition among his heirs. The learned Judges held

1. (1915) I.L.R. 39 B. 545.

Mt. Amir Bi v. Abdul Rahim Sahib.

that it was an administration and not a partition suit. Again in *Essafally* v. *Abdeali*[2] the same view was taken. It was a suit filed in 1915 in respect of a Mahomedan who died in 1904. The Chief Justice makes the following observations:—

"The point is abundantly clear that if there is an estate it can be administered, and if a party who has an interest in that estate has asked the Court to administer that estate, even if he knows exactly what it consists of, he is entitled to come to Court and ask for a preliminary decree for the administration of that estate. He is not bound, even although he knows what the estate consists of, to file a suit for partition. He may do so or he may not. That is no reason why, if he wishes to file an administration suit to get the estate administered in the proper way, he should not do so."

In this suit it cannot be urged that the plaintiff has adopted this form of plaint *mala fide;* for one has merely to glance at the written statement of the 7th defendant (one of the principal contesting defendants) to come to the conclusion that this is pre-eminently a case where the Court has to assume the management of the estate. He alleges that mahar was due to his own mother and those that are entitled to it are defendants 7 to 17 (paragraph 11); and not the plaintiff and her children (paragraph 16). He denies that the estate is liable to be divided in the shares mentioned in the plaint and asserts that it has to be divided in a different manner as set forth in paragraph 12 of his statement. He then goes to say—and this is very important—that if he is bound to restore to the estate the benefits received by him under the release referred to in the plaint, the plaintiff and her children are similarly bound to bring into the hotch-pot properties which he alleges they likewise received during the life-time of Abdul Razaak.

I have referred to the written statement not because the question of jurisdiction is to be decided with reference to what the (7th) defendant says, but as it shows beyond doubt that the allegations made in the plaint have not been made merely to enable the plaintiff to adopt a particular form of action. I fail to see how such a suit is not an administration suit. The parties are not agreed as to the extent of value of the property; they are not agreed as to the persons entitled to share, nor are they agreed even in regard to the debts payable (*vide* their contentions about mahar). On each of these matters, the parties desire an enquiry and it is in an administration suit that such an enquiry can properly be made. For the defence *Abdul*

2. (1920) I.L.R. 45 B. 7.

Karim Sahib v. *Badrudeen Sahib*[3] is relied on. It is said that a plaint with similar allegations was treated in that case as a plaint in a suit for partition and not a suit for administration. I need say no more than that the plaint before me is in some respects different from the plaint in that case, and that a decision on facts cannot be treated as settling a question of principle. I find it difficult, therefore, to accept that case as an authority for the very broad proposition that the heirs of a deceased Mahomedan can never file an administration suit. Indeed in *Moideensa Rowthen* v. *Md. Kasim Rowthen*,[4] Ayling and Tyabji, JJ., observe that the true position is quite the contrary :

"In the case of Mussulmans, what would be a partition suit, if the parties were Hindus, ought often to take the form of a suit for the administration of the estate of a deceased person" (at page 896).

There is much force, if I may say so with respect, in this observation. In the case of persons governed by the Mitakshara, partition suits are not necessarily in respect of property of a deceased person. The status as such, of a member of a Hindu coparcenary, gives him certain rights in the property; and family partition is frequently unconnected with the death of any person. I have come to the conclusion that this is an administration suit and my decision on this point is, therefore, in favour of the plaintiff.

I shall next deal with the second question : Is an administration suit a suit for land? In numerous cases it has been held that it is not; and this proposition is not seriously disputed by Mr. A. Suryanarayanaiya for the defence. A suit for land does not lie on the Original Side of the High Court, if the land is wholly situated outside the city; if a part of the land is within the jurisdiction of the Court, it can entertain the suit if leave to sue has been previously obtained. See clause 12 of the Letters Patent. It follows from this, that where the land is wholly situated beyond jurisdiction, the fact that leave to sue has been granted does not enable the Court to entertain the suit. In this case, as the whole of the land to which the suit relates is outside jurisdiction, the question becomes important : Is this a suit for land?

---

3. (1904) I.L.R. 28 M. 216.
4. (1915) 28 I.C. 895.

Mt. Amir Bi v. Abdul Rahim Sahib.

In *Nistarini Dassi* v. *Nundo Lal Bose*[5] it was held that an administration suit is not a suit for land. The learned Judges, for holding they had jurisdiction, give two reasons. First, that an administration suit is not a suit for land; secondly, in that case, as the estate consisted of land partly in Calcutta and partly outside "the defect, if defect there were," was cured by the leave to sue having been previously granted. This case went up to the Privy Council and the decision of the High Court was confirmed, *Parmeswar Singh* v. *Emperor*[6] and their Lordships rest their decision on the sole ground that an administration suit is not a suit for land. *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[7] was an administration action. It comprised moveable property within the city and land and houses wholly outside the jurisdiction. It was not suggested in that case that the suit was a suit for land, and the case proceeded upon the footing that it was not such a suit. This case also went up to the Privy Council and the view of the High Court in regard to jurisdiction was upheld. The test that was applied at all stages of this case was : Where did the cause of action arise? and not where was the land situated? (See also the judgment given at the foot-note to *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[7].) If the suit was a suit for land, it was open to the defendant there to have it dismissed on that ground without being driven to rely (as he was) upon other supposed defects of jurisdiction which he alleged. In *Abdul Hussein* v. *Mahomedally Adamji*[8] again, the immoveable properties were wholly outside the jurisdiction, but the Court held that it could entertain the suit as it was an administration suit. I am therefore of the opinion that the present suit is not a suit for land.

I shall now proceed to consider the third point. In an administration suit, where the land is wholly outside jurisdiction, *can the Court decide questions of title to such land or any part thereof?* This point again is covered by clear authority. In *Benode Behari Bose* v. *Nistarini Dassi*,[9] to which I have referred, their Lordships of the Judicial Committee say that, as the primary object of the suit was the administration of the estate, the Court has jurisdiction to set aside, as ancillary to such

5. (1902) I.L.R. 30 C. 369.
6. (1910) I.L.R. 38 C. 180 at 181.
7. (1906) I.L.R. 29 M. 239 : 16 M.L.J. 238.
8. (1921) I.L.R. 46 B. 772.
9. (1905) L.R. 32 I.A. 193: I.L.R. 33 C. 180: 15 M.L.J. 331 (P.C).

Mt. Amir Bi v. Abdul Rahim Sahib.

a purpose, leases of land outside the territorial limits of the Court. In *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*,[7] to which also I have referred, it is noticeable that the Court passed a decree affecting immoveable property outside its territorial limits (*see* page 244), although I may state in this connection that it was contrary to the expectation of the Judges who decided *Abdul Karim Sahib* v. *Badrudeen Sahib*[3]. For, the learned Judges in the last-mentioned case referring to an earlier stage of the case reported in *Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[7] observe:

"Full relief could be given in the suit without having recourse to the land out of the jurisdiction." (28 M. 216 at 221)

As I have pointed out, what subsequently happened was the very reverse of this and the Privy Council affirmed the decree of the Madras High Court (*Srinivasa Moorthy* v. *Venkata Varada Aiyangar*[10]). *Mahomed Ally Adamji* v. *Abdul Hussein*[11] is again a direct decision on the point. The learned Judges point out that in an administration suit a complete enquiry necessarily implies determination of title to immoveable property and the Court is bound to decide questions as to ownership of such property—whether situate within or outside jurisdiction—*as an incident* of the administration of the estate.

Apart from authority, I may refer by way of analogy, to cases, where the High Court has jurisdiction to try suits, part of the land being within its local limits, provided leave to sue has been previously obtained. In such cases, does the Court refuse to try questions of title to land outside jurisdiction? The fact that some land is beyond jurisdiction is immaterial and the Court having initial jurisdiction is deemed competent to try questions of title in regard to every parcel of land to which that suit relates. How can, on principle, any distinction be made, in this respect, between a case where land is partially outside and land wholly outside?

I have no hesitation, therefore, in holding that the Court can in this suit adjudicate upon title to property outside its jurisdiction.

It is said that the view I am taking will make it possible for any administration suit being filed in the High Court. Not

3. (1904) I.L.R. 28 M. 216.
7. (1906) I.L.R. 29 M. 239: 16 M.L.J. 238.
10 (1911) I L R. 34 M. 257: 38 I.A 129: 21 M.L.J. 669 (P.C.).
11. (1923) I.L.R. 48 Bom. 331.

Mt. Amir Bi v. Abdul Rahim Sahib.

at all. The Court will not grant leave, unless a substantial portion of the cause of action has arisen within the jurisdiction. Supposing all the immoveable properties are outside jurisdiction and they represent the bulk of the estate, that may be a good ground for refusing leave; for, in determining what constitutes cause of action, one element is undoubtedly, where is the property (moveable or immoveable) situate? Take this very case where leave to sue was granted, part of the cause of action having arisen outside jurisdiction; if it had been wrongly granted, it was quite open to the defendants to apply for that leave being revoked. That is a remedy clearly open to a party if leave has been obtained by his opponent on insufficient grounds. I fail to see how the view I am taking can lead to hardship or inconvenience, apart from its being the view sanctioned by reason and authority.

I hold that I have jurisdiction to entertain the suit.

I fix the costs of this hearing at Rs. 250 which shall come out of the estate.

N.S. *Preliminary issue found for plaintiff.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE SRINIVASA AIYANGAR.

P. C. Muthu Chettiar .. *Petitioner* (2nd Plff.)*

v.

Narayanan Chettiar and others .. *Respondents (Defts.).*

Muthu Chettiar v. Narayanan Chettiar.

Time—Computation—"By a date fixed"—Meaning—Execution petition—Order on, directing the doing of a thing "by a date specified"—Dismissal of petition for default on the forenoon of the day specified—Jurisdiction—C P. Code, S. 115.

The word "by" when used with reference to time indicates either "in the course of," or "on". It must be construed in the same manner as "on" or "before."

Where on an execution application, the Court made the order "sale papers to be filed by 11th October, 1921," *held,* that the Court had no jurisdiction to call up the execution petition on the forenoon of the 11th October 1921 and to dismiss it for default of appearance.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to

---

*C.R.P. No. 460 of 1926. 16th November, 1927.

revise the order dated 11th October, 1921 of the Court of the Subordinate Judge of Ramnad at Madura dismissing E.P. No. 36 of 1920 in O.S. No. 14 of 1908.

Muthu Chettiar v. Narayanan Chettiar.

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for petitioner.

C. S. Venkatachariar for respondents.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—For a proper understanding of the various points raised and discussed in this Civil Revision Petition it is necessary that a few material facts should be set out. The petitioner before us obtained a decree in O.S. No. 14 of 1908 on the file of the Subordinate Judge's Court of Madura East. It was a decree for money and dated 25th February, 1908. After various execution petitions with which we are not at present concerned E.P. No. 36 of 1920 was filed on the 23rd February, 1920, that is to say, a few days before the expiry of 12 years, the time limited for execution of decrees under the Procedure Code. On the 27th September, 1921 final orders were passed on certain claims made in respect of attachment issued in execution and on that date a further order was made in the following words: "Sale papers to be filed by 11th October, 1921." Somehow or other, on the forenoon of 11th October, 1921 this execution petition appears to have been called and, in the absence of the execution creditor and his vakil, an order was made by the Subordinate Judge in the following terms: "not filed, dismissed." On the same day an application to restore this petition to file was made on behalf of the execution petitioner supported by an affidavit of the vakil's clerk and an order was made by the Subordinate Judge restoring the petition to the file, setting aside the order of dismissal but without any notice of such application to the opposite side.

On the same day, 11th October, 1921, another application E.A. No. 396 of 1921 was made by the execution petitioner for the purpose of allowing him to carry out certain amendments in the execution petition. Notice was issued in respect of this execution application for amendment of the petition, and when it came on for hearing objection was taken on behalf of the judgment-debtor to the order previously passed restoring the execution petition once dismissed. The learned Subordinate Judge gave effect to this objection and held that the order of restoration was

Muthu Chettiar v. Narayanan Chettiar.

Srinivasa Aiyangar, J.

wrongly made, and he thereupon not only dismissed the execution application for amendment but also made an order that the execution petition was dismissed. Against this A.S. No. 153 of 1922 was preferred to the District Court. The learned District Judge reversed the order of the learned Subordinate Judge holding that the order for restoration was properly made and that, therefore, the application for amendment should be remanded to the lower Court for disposal in the ordinary course. He also made a further order setting aside the order of dismissal of the execution petition made by the Subordinate Judge.

Against this the judgment-debtor preferred Appeal against Appellate Order 63 of 1924 to this Court. The judgment of this Court in that case is reported in *Narayanan Chettiar* v. *Muthu Chettiar*.[1] This Court came to the conclusion that the application for restoration was incompetent either under Order 9 of the Civil Procedure Code or under the review section or even under section 151 of the Procedure Code. In the result, therefore, this Court reversed the order of remand made by the District Court and confirmed the order made on the application for amendment by the learned Subordinate Judge. The Civil Revision Petition before us was presented on the 6th March, 1926 for the purpose of revising the order of dismissal of the execution petition made on 11th October, 1921.

The first objection that has been urged with regard to the competency of this Civil Revision Petition is that subsequent to the order of dismissal passed by the Subordinate Judge there was another order of dismissal passed by the same Subordinate Judge on the 14th March, 1922, that that order should be deemed to have been finally restored by the decision of this Court above referred to and that, therefore, the petitioner could not reasonably ask for this Court revising an earlier order of dismissal when a subsequent order of dismissal has been restored by this Court. It is difficult to accept the contention that the subsequent order of dismissal by the Subordinate Judge was really a judicial order on any question raised or contentions made before him with regard to the execution petition. When he came to the conclusion that the order of restoration was wrong, it necessarily followed that the previous order of the Court dismissing the execution petition stood and, therefore, the order of dismissal by the Subordinate Judge, on the 14th March, 1922, merely amount-

1. (1926) I.L.R. 50 M. 67; 51 M.L.J. 219.

ed to a confirmation of the previous order, or, in other words, a declaration that by reason of the order for restoration being set aside the previous dismissal stood. However, when this matter came up on appeal before the District Judge, he not only took the view already adverted to, but made a distinct order setting aside this order of dismissal made by the Subordinate Judge. No appeal specifically was taken with regard to that order by the judgment-debtor to this Court, and there is no discussion at all with regard to it in the judgment of this Court. We have also sent for formal order passed by this Court on the judgment, and it is clear therefrom that what the Court did was merely to cancel the order of remand and confirm the dismissal of the application which was made for amendment. It could no doubt be argued that, as the order of the Subordinate Judge subsequently dismissing the execution petition has been set aside rightly or wrongly by the District Judge and as that order has not till now been disturbed it follows that the execution petition is still pending. But there seems to be no doubt whatever that even what the District Judge did do or did purport to do was only again to declare the result of his findings with regard to the restoration application on the order of dismissal of the execution petition originally made by the Court on the 11th October. As he took the view that the order of restoration was proper we must construe this order setting aside the later order of dismissal by the Subordinate Judge only to amount to a declaration that as the order of restoration was proper the subsequent order of dismissal should be set aside. If that is the true view there can be no question at all of any subsequent order of dismissal being operative after all these proceedings and appeals. We must, therefore, take it that the state of things at present is the subsistence of the order of dismissal of the 11th October, 1921, and it is that order which this Court is now invited to revise and set aside.

The next objection to the maintainability of this Civil Revision Petition is naturally the fact that it has been presented to this Court considerably over four years after the order was made. In this case we are asked to exercise the revisional jurisdiction of this Court, and it may at once be pointed out that though as a matter of practice this Court exercises the jurisdiction only on the application of the parties the jurisdiction itself is not confined to such cases. Again when this Court made a conventional rule to the effect that such Civil Revision

Muthu Chettiar v. Narayanan Chettiar.

Srinivasa Aiyangar, J.

Petitions should be filed within the same period as appeals, namely, 90 days, it was not on any ground that the period of limitation was so fixed for the purpose of filing Civil Revision Petition, but as it is a revisional jurisdiction and therefore within the discretion of the Court, the Court said it would not consider a Civil Revision Petition filed after that date. The question therefore becomes necessary to be so considered whether in this case, having regard to the lapse of the long period, the Court would be justified in interfering with the order under consideration. Even if it is not a mere Civil Revision Petition but an appeal, there seems to be little doubt that, having regard to all the circumstances of the case the petitioner would as appellant be entitled to ask the Court to exclude from computation the whole of the period taken up by him from almost the 10th October, 1921, till about the very date on which the Civil Revision Petition has been filed in prosecuting the various proceedings and appeals therefrom which had for their clear object the restoration of the execution petition which was dismissed. It is true that the ground on which the restoration was sought or the order of restoration that was made was sought to be sustained was not the same as here. But there can be no doubt that the relief was the same. It cannot be suggested that the petitioner was either guilty of any laches or negligence in the matter, when we find him throughout the period engaged in prosecuting or defending the proceedings which had for their object the very thing for which he has now filed this petition. No doubt it is an exceptional case and must be treated so. The question therefore of the mere lapse of time, it seems to us, cannot be taken into consideration and the objection therefore must be rejected.

The learned vakil for the petitioner argued that the order made on the 27th September being to the effect that the sale papers should be filed by the 11th October, 1921, the execution petitioner had time till the end of the 11th for the purpose of filing such papers, and that, therefore, the Court acted without jurisdiction and at any rate with material irregularity in calling up the petition on the forenoon of that date and dismissing it on the ground that the order previously made had not been complied with. Though this construction of the order was strenuously opposed by the learned counsel for the respondent, it seems to us that the matter was not even open to argument. The expression "by" clearly indicates the utmost limit of time being

Muthu Chettiar v. Narayanan Chettiar.

Srinivasa Aiyangar, J.

the end or the expiry of the date or period indicated. We have been referred to Murray's New English Dictionary and there we find that it is clearly pointed out that the word "by" when used with reference to time indicates either 'in the course of' or 'on'. The word "by" therefore must be construed in the same manner as "on or before". If that is the proper construction, as we hold it to be, it is clear that the Court was not entitled to call up the case on the forenoon of the very day the whole of which the petitioner had for the purpose of complying with the order of Court. There could possibly be no default on the part of the petitioner if at any rate he had the other remaining hours of the day for the purpose of complying with the order.

The learned counsel for the respondent also strenuously contended that the order was read and understood by the execution petitioner himself and also by his legal advisers as meaning or intimating that the sale papers could be filed on or before the previous date, namely, the 10th October. We are not satisfied that that was really how the order was understood by the petitioner. It cannot be said that the mere reference to the order for the purpose of restoration can be regarded as indicating the meaning that they attached to the expression. After all what we have to do is not really to see how the parties understood but what the order of Court really means. There is also no foundation for the contention that was put forward that the 11th October, 1921, was the date to which the hearing of the execution application itself stood adjourned. There is nothing in the records or even in the B diary to show that the hearing of the petition stood adjourned to that date. In view of these considerations we think that the order of the Subordinate Judge dismissing the execution petition on the forenoon of the 11th October was wrong.

One last argument was also advanced by the learned counsel for the respondent and that was that it was open to the petitioner before us, the execution creditor, to have made this wrong construction of the order not only a ground in his application for restoration but also a ground of defence on appeal to this Court. The subject-matter of the application on which the order for restoration was made was the default to appear of the party and all the Courts since then till the final order on appeal to this Court were concerned merely with investigating the question whether the Court had jurisdiction, once the execution petition was dismissed, to restore it under any one of the provisions of

Muthu Chettiar v. Narayanan Chettiar.

Srinivasa Aiyangar, J.

law which might be regarded as in any manner applicable thereto. If no doubt this point had been made a ground of attack or defence at any time and the matter was adjudicated previously it would not be open to the petitioner now to come up on revision. There is absolutely no indication anywhere throughout all these proceedings of this matter having been discussed or considered The mere fact that the question now raised is capable of being regarded as an afterthought seems to us to be really no objection to the maintainability of the petition, if otherwise we should be satisfied that the order now under revision was clearly wrong and unsustainable. This Court having held in the decision above referred to that the application for restoration was not competent under Order 9 of the Civil Procedure Code or under the review section or even under section 151 of the Procedure Code so far at least as the present case is concerned, the decision is final and conclusive though we may take leave to observe in this connection that, if the same question should arise in some other case, the decision of the learned Judges in that case might require reconsideration.

The result of holding that even though an execution application for a large amount might come to be dismissed by the first Court for non-appearance or for failure to put in some paper or some such formal defect the Court has absolutely no power at all to set aside the order of dismissal under any provisions of law would be virtually to hold that a person by some such small inadvertence would be entirely losing the benefit of a decree passed in his favour by a Court of law. Anyhow in this case as we are satisfied that the order of the 11th of October was clearly wrong and was made without jurisdiction it follows that it must be set aside. We accordingly direct that the order of dismissal of E.P. No. 36 of 1920, dated 11th October, 1921 be set aside and the execution petition restored to file and disposed of in the usual course. Having regard to the long period of time that has elapsed between the date of the order now under revision and this present revision petition we direct each party to pay and bear his or their own costs.

A.S.V. *Order set aside and Revision allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—VISCOUNT SUMNER, MR. AMEER ALI AND SIR JOHN WALLIS.

The Secretary of State for India in Council .. *Appellant** (*Deft.*)

v.

Valarpuram Kandadai Ramanujachariar and others .. *Respondents* (*Plffs.*).

P. C.

The Secretary of State for India *v.* Ramanujachariar.

Ryotwari tenure—Chingleput District—Thirty years' settlement of 1910 *—Notification of 1st June,* 1910*—Clause 36—Reservation in—Meaning and effect—Achukattu lands—Wet crops raised on—Levy of wet rate in case of—Legality—Wet crops raised even prior to settlement of* 1910*—Effect.*

Wet crops having been raised on achukattu lands which were "retained as ordinary dry", and which were registered as dry and assessed accordingly at the thirty years' settlement of 1910, in the Chingleput District, the Government levied an enhanced assessment on those lands, the enhancement representing the difference between wet rates and the dry rates already paid. Wet crops had been raised on the said lands even prior to the settlement of 1910. In a suit by the owners of the lands, *inter alia*, to recover from the Government the enhanced assessment so levied on the ground that the levy thereof was opposed to the Notification of 1st June, 1910, and was illegal, *held*, that the levy of the enhanced assessment in question was not opposed to the said Notification and was not illegal, and that it did not give the plaintiffs any cause of action.

So long as lands registered as dry were cultivated with dry crops it would obviously be unfair and opposed to the whole scheme of the settlement that their assessments should be enhanced. On the other hand, there would be nothing harsh or unreasonable in providing that, if during the period of the settlement the pattadar should raise valuable wet crops on lands registered as dry, that is, as bearing the much less valuable dry crops, he should be called upon to pay at the higher rates. The reservation as to lands which might be converted from dry to wet or manavari, in cl. 36 of the Notification of 1st June, 1910, was inserted for the purpose of meeting such a case.

Conversion, within the meaning of cl. 36 of the said Notification, means conversion by the pattadar and only reserved to the Government a power to increase the assessment where there had been such a conversion. In considering whether there has been a conversion within the meaning of the reservation in cl. 36, the fact that wet crops may have been raised on the lands prior to the settlement is not the governing consideration. The raising of wet crops on land registered at the settlement as dry is a conversion within the meaning of the reservation. So long as they cultivated the land as dry the pattadars were entitled to hold the lands for the whole period of the settlement at the rate assessed on them as such, but when they proceeded to raise wet crops upon them they effected a conversion and justi-

*P.C. Appeal No. 128 of 1926. 14th June, 1928.

P. C.

The Secretary of State for India v. Ramanujachariar.

fied the revenue authorities in imposing upon them "corresponding wet assessment," that is, the appropriate wet rates.

Consolidated Appeal No. 128 of 1926 from one judgment and six decrees of the High Court, Madras (Devadoss and Jackson, JJ.), dated the 27th August, 1924, affirming a judgment and six decrees of the District Judge of Chingleput, dated the 8th March, 1921. *See* 47 Madras Law Journal, 780, where the judgment of the High Court is reported.

Dunne, K. C., and *K. Brown* for appellant.

Abdul Majid for respondents.

14th June, 1928. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—The plaintiffs, who are ryots in the Chingleput District of the Madras Presidency, instituted these six suits, which were tried together, against the Secretary of State in Council, in the Court of the District Munsif of Poonamallee, to recover certain assessments which had been levied on them by Government in addition to the dry rates which had been assessed on their lands at the thirty years' settlement of 1910. The District Munsif allowed the suits, and his decision was affirmed on appeal by the District Judge of Chingleput and on second appeal by the High Court of Madras. The defendant then applied to and obtained from the High Court certificates that the cases were fit for appeals to His Majesty in Council, as though the actual sums in dispute were small the decision affected the right of Government to considerable revenue and involved a question of general and far-reaching importance, the appellant undertaking at the same time not to claim costs against the respondents in the event of the appeals being successful.

The plaint in each case alleged that the plaintiff had been holding the suit land paying the assessment as fixed by the Settlement Officer in the resettlement of 1909; that the lands had been classified during the said settlement as achukattu lands in consequence of the high ridges that surround them to facilitate paddy (rice) cultivation with the aid of rain water that may be stored on them during the rainy season, and that Government had assessed them at a higher rate than is usually paid for lands of similar quality in the neighbourhood, but without such facilities. It was further alleged that in faslis 1324 and 1325 Government illegally levied an additional water cess on the lands and collected it by coercive process in the years 1915 and 1916; that the

Board of Revenue on the plaintiff's appeal ordered the water cess so levied to be refunded as illegal and unauthorised, but at the same time apparently authorised the revenue authorities to collect the same amount under the head of enhanced assessment, and that the plaintiff was compelled to submit under protest to the amount of the refund being applied in satisfaction of the fresh claim. This so-called enhanced assessment, it was alleged, was practically the levy of a fresh tax to which the defendant was not entitled in law, and the plaintiff was entitled to hold the land with reference to the usual settlement rate fixed with reference to the situation of the land and the facilities of cultivation existing at the date of the settlement. Further, no additional facilities of irrigation or cultivation had been effected since the settlement either by the Government or by the plaintiff himself. Lastly, it was alleged that the achukattus in question were not objectionable as they in no way obstructed or delayed any flow of water to any Government source of irrigation, and that these facilities had been enjoyed by the plaintiff and his predecessors for more than sixty years and recognised by Government in their classification of the lands in the last settlement. The plaintiff accordingly sued to recover the enhanced assessment already mentioned, as well as a further sum collected for fasli 1326, and also prayed for a permanent injunction restraining the defendant from levying enhanced assessment on the plaint lands for future faslis.

The defendant filed a written statement, of which the most material portions were as follows :

"4. The averments in paragraphs 3 to 5 of the plaint are incorrect. Whatever view may be taken with reference to the question of proprietary interest in land as between a ryotwari pattadar and Government, there can be no dispute as to Government right to impose such assessment as they consider reasonable and proper on lands included in the holding of such a pattadar. The imposition of the assessment and its increase or decrease cannot be questioned by means of a suit and the Court has no jurisdiction to question the legality or validity of the imposition. Even supposing the lands were enjoyed as achukattu lands for a very long period, an allegation which this defendant does not admit and which the plaintiff will have to prove, that circumstance would not take away the right of Government in their sovereign capacity to levy additional assessment on the lands at any time. The State can claim a share in any crop grown on ryotwari land by impounding the rain water which falls on the land. The Government are entitled to charge wet assessment on the land in lieu of claiming a share of the wet crop. The rate of assessment that may be fixed on such lands cannot be questioned by the Courts *Vide* section 58 of the Madras Revenue Recovery Act II of 1864.

P. C.

The Secretary of State for India v. Ramanujachariar.

Sir John Wallis.

"5. The allegation in the plaint that the Government cannot vary the assessment imposed at the time of settlement is incorrect. Such right is recognized in paragraph (33) of the settlement notification in respect of such lands as those in the suit.

"6. The achukattus in question were objectionable and were considered to be so, as they had the effect of cutting off the supply of water to tanks lower down.

"9. The levy of enhanced assessment is legal and valid with reference to all the faslis in question."

The defendant also pleaded that as regards fasli 1326 the suit was bad for want of notice, that it was barred by limitation, and that the plaintiff was not entitled to the injunction sought for.

On these pleadings the Court framed the following issues:

"I. Has this Court no jurisdiction to question the legality of the levy in question ?

"II. Is this suit within time?

"III. Is this suit bad to the extent of the collection made in fasli 1326 for want of notice?

"IV. Are the plaint mentioned achukattus objectionable?

"V. Is the collection complained of illegal?

"VI. Is the defendant's right to levy the tax in question barred by limitation under Article 149 of Schedule I of the Limitation Act?

"VII. Is the retrospective effect given to the levy *ultra vires* ?

"VIII. Did the plaintiff make the payments in question voluntarily? If so, is he entitled to claim a refund of the same ?

"IX. To what relief is the plaintiff entitled ?"

No oral evidence was called on either side. The plaintiffs contented themselves with putting in the Notification of June 1, 1910, of the Special Settlement Officer Exhibit A, stating the conditions on which the resettlement was to be effected, and the defendant filed certain Proceedings of the Board of Revenue and Government Orders showing the way in which the question of achukattus had been dealt with prior to the settlement, and also the Board's Proceedings directing the refund of the water cess levied on the plaintiff and the levy on him of an enhanced assessment for his wet achukattu cultivation, which was to be "the corresponding wet assessment *minus* the dry assessment already levied."

On the main issue the District Munsif held that Government was bound to respect the solemn pledge given in the proclamation, Exhibit A, that the rates of assessment at the resettlement should remain unchanged for a period of thirty years except under the circumstances mentioned therein, which he held not to have arisen, and he found this and the other issues in favour of the plaintiff.

On appeal the District Judge, Mr. R. A. Jenkins, I.C.S., held that the terms of the resettlement were binding on the Government, and that section 58 of the Madras Revenue Recovery Act, 1864, was no bar to a suit to recover enhanced assessment not in accordance with the terms of the settlement. On the question whether the terms of the Notification Exhibit A of June 1, 1910, reserved to Government the right to levy enhanced assessment for wet cultivation on the suit lands by achukattus, he held that the provision in the Notification that lands on which wet crops were raised by achukattus if they are "situated so close to the foreshore of a Government irrigation work as materially to interfere with its supply" were to be retained as ordinary dry, and were to be "dealt with by the Collector in accordance with the practice obtaining in the district," did not reserve any right to alter the assessment during the period of thirty years, but that "the object of leaving the lands to be dealt with according to the district practice was to compel the ryots to remove the objectionable ridges by imposing a heavy rate."

The rate fixed at resettlement could not, he held, be raised during the period of the settlement "except as expressly reserved —such as by conversion from dry to wet or manavari." He did not, however, deal with the question whether the subsequent raising of wet crops on lands registered at the settlement as dry did not amount to such a conversion within the meaning of the reservation. He held it unnecessary to decide whether these achukattus were objectionable or not, but otherwise affirmed the findings of the District Munsif and dismissed the appeal.

The cases then came before the High Court on second appeal, when Jackson, J., who delivered the judgment of the Court, dealt with the reservation in the Notification as to objectionable achukattu cultivation as follows :

"The defendant contends that the provision in the Notification Exhibit A 'will be dealt with by the Collector in accordance with the practice obtaining in the district' allows a large discretion. The practice, no doubt, was to charge water-rate if a paddy crop was raised; but since such charges are not rightly leviable under the Irrigation Cess Act, an enhanced assessment practically amounts to the same thing, and can be described as 'in accordance with the practice obtaining in the district.' The short answer is that such practice never did obtain nor could obtain. Once a settlement has been duly notified by Government, the Collector acting under the orders of the Board of Revenue cannot vary the rates of assessment."

He also held that the reservation as to "lands which may be converted from dry to wet" referred to physical conversion

P. C.
The Secretary of State for India v. Ramanuja-chariar.
Sir John Wallis.

and did not mean that Government reserved to themselves the right at any time to convert the classification of a land as dry to one of wet. If that were so, he observed, there would be no settlement. He, again, did not deal with the question whether there had been such a conversion. After finding other issues in favour of the plaintiff, he directed the decrees to be varied by omitting the injunction and otherwise dismissed the second appeals.

The three Courts before which these cases came in India agreed in holding that the imposition of these additional assessments was not in accordance with the terms of the settlement of 1910, that Government was not entitled to vary the terms of that settlement so long as it continued in force, and that the Civil Courts are not barred of jurisdiction to afford redress.

With these last two contentions it is unnecessary for their Lordships to deal, because Mr. Dunne, who appeared for the defendant and disclaimed on the part of the Government any desire to depart from the terms of the settlement, refrained from arguing them before their Lordships and elected to stand or fall upon the question whether these additional assessments were in breach of the settlement.

To explain the nature of this question and show how it arose, their Lordships will refer in the first instance to the letter of Mr. G. A. D. Stuart, I.C.S., Special Assistant Settlement Officer, of 30th September, 1907, asking for instructions and making suggestions in paragraphs 5 to 7 of the letter as to how "manavari lands," "achukattus," and "wet under waterspread" were to be dealt with in the new settlement. "A peculiarity of this district," he observed, "is the large extent of paddy (rice) grown on low-lying lands without any regular irrigation. Low bunds are raised round the lands to retain rain water, and lands also often get the benefit of percolation from neighbouring wet fields, small ponds or *tangals,* springs at the base of low hills, etc. Such lands are termed manavari (rain fed). At the last settlement all manavari lands that received regular irrigation from a Government source were treated as wet, and the rest treated as dry, but assessed at special rates, which were usually one, but sometimes two or three tarams higher than the rates applied to other dry lands in the same block." For reasons which he gave, the Settlement Officer recommended that in the new settlement these lands in future should not be classed either as wet or dry, but should be put into a new class of manavari (rain fed) lands,

P. C

The Secretary of State for India v. Ramanujachariar.

Sir John Wallis.

and this recommendation was accepted by Government. He then proceeded to deal with achukattu cultivation, and stated that since the last settlement a large extent of dry land had been brought under manavari cultivation by raising bunds about 2 feet high, called achukattus, round the fields and so holding up sufficient rain water after heavy rain to grow a paddy (rice) crop. Where such lands were situated near the foreshore of a tank, he was of opinion that the supply of the tank was interfered with, and that this interception might become serious when every field in the catchment area of a small tank was bunded. It is of course obvious that interference with the customary water supplies of a tank might injuriously affect ryots holding wet lands under it and raising one, or even two, wet crops every year by the aid of tank water, and might so affect their ability to pay the high rates of assessment which had been imposed on them in consequence of these facilities for raising valuable crops.

It had been the practice, Mr. Stuart stated, to impose water-rate on this achukattu cultivation whenever it was considered that the supply to any tank had been interfered with. Water-rate here means "a separate cess" leviable for water taken from a Government source under Madras Act VII of 1865 which came under the consideration of this Board in *Prasad Row* v. *Secretary of State for India in Council*[1]. The view of the Madras Government was that they were entitled to impose this water-cess at such rates as would effectively deter the ryot from persisting in this method of cultivation. Mr. Stuart now proposed that it should be decided once for all which were the lands on which achukattus could be raised "and which the lands on which the raising of achukattus should be penalized."

In a subsequent Board's Proceeding of the 11th September, 1908, these proposals of Mr. Stuart's are referred to as being that achukattu lands situated close to the foreshore of a tank should be entered in a special list to be furnished to the Revenue Department *"in order that their cultivation may be put down by the imposition of a penal water-rate"*.

These proposals were adopted at the settlement. Achukattu cultivation which was unobjectionable was not entered as wet or dry, but in the new manavari or rain-fed class already mentioned, while lands included in the list of objectionable achukattus were retained in the class of dry, that is to say, as bearing dry crops and with lighter rates of assessment, it being in-

1. (1917) L.R. 44 I.A. 166 at 174 : I.L.R. 40 Mad. 886 : 33 M.L.J. 144 (P.C.)

P. C.

The Secretary of State for India v. Ramanujachariar.

Sir John Wallis.

tended to prevent the ryots from raising wet crops on them by putting up achukattus and so interfering with the tank water supply. Had they been classed at the settlement either as wet or manavari and so rated as growing wet crops, there would have been no case afterwards for imposing the statutory water-cess upon them unless they acquired some fresh source of supply and there could have been no case at all for imposing penal water-cess for the purpose of putting down this sort of cultivation.

In the light of these observations their Lordships will now proceed to consider the terms in which this achukattu cultivation was dealt with in paragraph 23 of the Settlement Notification, of which the following are the material portions :—

"23. *Achukattus.*—In addition to the fields registered as 'Manavari' at the settlement there are numerous dry fields which have since been converted into 'manavari' by the erection of high bunds or achukattus, which store up rain water and obstruct surface drainage. The Government have decided that such lands should be transferred to 'Manavari' and assessed at manavari rates, unless they are situated so close to the foreshore of a Government irrigation work as materially to interfere with its supply. Lands of the latter description will be retained as ordinary dry and will be dealt with by the Collector in accordance with the practice obtaining in the district."

As has been already shown, the practice obtaining in the district was to endeavour to check this sort of cultivation when deemed objectionable by imposing a water-rate in addition to the assessment under Madras Act VII of 1865. The wording of the Notification is taken from the Government Order of 14th August, 1909, dealing with the general proposals for the resettlement, and directing that these objectionable achukattu lands should be entered in a special list and left to be dealt with by the Collector in accordance with the existing district practice, as embodied in G.O. No. 593 Revenue, dated 24th June, 1905. That order, which deals with "the question of charging water-rate for wet cultivation raised with the aid of water collected by means of achukattus, or bunds temporarily erected to intercept drainage from dry lands," states the practice as follows :—

"2. The correct procedure for the treatment of such cultivation is laid down in G.O. No. 852, dated 30th August, 1887, as explained by G.O. No. 205, dated 9th March, 1888, viz., that water-rate should be charged if the achukattu by means of which water is collected intercepts water which would otherwise flow into a Government tank or other irrigation work. This rule should be strictly followed."

In their Lordships' opinion the lower Courts have not given sufficient consideration to the direction in clause 23 that lands

P. C.

The Secretary of State for India v. Ramanuja-charlar.

Sir John Wallis.

of this description should be "retained as ordinary dry," that is to say, with the incidents of land registered as dry. The earlier clauses 12 to 14 had provided for lands registered as dry being transferred in certain cases to wet, and wet lands to dry, and for assigning to them a soil classification suitable to their new registration. Obviously these transfers were to be made at the time of the settlement with a view to the imposition of the appropriate assessment. Clauses 29 and 30 provided that at the resettlement, pattas were to be issued to the ryots showing, in accordance with the new registers, "the description of the land, *e.g.*, Government dry, wet, manavari, single crop, double crop, baling, etc., the registered source of irrigation, *and the assessment which will hereafter be levied on the land.*" It may, therefore, be taken that pattas were issued to the plaintiffs showing that in the new registers their lands were registered as dry and showing also the assessment which was to be thereafter levied on the land.

After the new settlement had come into force the Collector proceeded to deal with this achukattu cultivation which had been found objectionable, as directed in the Notification, according to the practice obtaining in the district, that is to say, he imposed upon them in addition to the assessment a separate cess under Madras Act VII of 1865, with a view of putting down wet achukattu cultivation by the imposition of a penal water-rate. The plaintiffs appealed to the Board of Revenue, who apparently were advised that the imposition was illegal and directed it to be refunded. They went on to observe : "The achukattus in question are objectionable and, therefore, although water-rate under the Irrigation Cess Act is not leviable, the lands concerned are, in accordance with the orders of Government, liable to enhanced assessment; an appropriate enhancement in the present circumstances would be the difference between the wet and dry rates. The water-rates levied will be refunded, but an enhanced assessment will be charged for the wet achukattu cultivation, and this should be the corresponding wet assessment *minus* the dry assessment already levied."

The only question for their Lordships' decision now is whether these orders can be supported under the terms of the Notification, that is to say, whether the revenue authorities, having at the resettlement registered the suit lands as dry and imposed assessments upon them on that basis in the belief apparently that by the imposition of the statutory water cess

P. C.

The Secretary of State for India v. Ramanuja-chariar.

Sir John Wallis.

they could prevent them from being used for wet achukattu cultivation, were entitled under the terms of the Notification, when this method failed them, to depart from the terms of the pattas and impose wet rates of assessment on the lands. This question, in their Lordships' opinion, depends on the effect of clause 36 of the Notification, which is as follows:—

"36. The resettlement will remain in force for the usual period of thirty years and the rates of assessment now sanctioned will remain unchanged for that period. Government reserve to themselves the right to revise on the expiry of the said thirty years the assessment on land in such manner as may then seem just and proper. . . The thirty years' limit does not apply to lands the irrigation of which may be improved by Government subsequent to the resettlement nor to lands which may be converted from 'dry' to 'wet' or 'manavari'. Modifications may also be made in the case of lands in the waterspread of tanks."

For the appellant, reliance was placed on the stipulation that the thirty years' limit is not to apply "to lands which may be converted from 'dry' to 'wet' or 'manavari'."

It has been held by the lower Courts that these words cannot mean that Government reserves the power to transfer any lands it pleases from dry to wet. As already pointed out, the Notification had provided for the transfer at the time of the settlement of certain dry lands to wet and certain wet lands to dry in the settlement register, and to say that after the settlement had come into force Government could transfer at will dry lands to another class and assess them accordingly would, in the opinion of the High Court, be tantamount to saying that, at any rate in the case of lands registered as dry, there would be no settlement at all. They were therefore of opinion that the reservation could not have that effect. Now so long as lands registered as dry were cultivated with dry crops it would obviously be unfair and opposed to the whole scheme of the settlement that their assessments should be enhanced. On the other hand, there would be nothing harsh or unreasonable in providing that, if during the period of the settlement the pattadar should raise valuable wet crops on lands registered as dry, that is, as bearing the much less valuable dry crops, he should be called upon to pay at the higher rates. In their Lordships' opinion, the reservation as to lands which might be converted from dry to wet or manavari was inserted for the purpose of meeting such a case, and they will assume, as held by the High Court, that conversion meant conversion by the pattadar and only reserved a power to increase the assessment where there had been such a conversion.

P. C.

The Secretary of State for India v. Ramanujachariar.

Sir John Wallis.

The only question, then, is, has there been any such conversion by the pattadar plaintiffs in this case? In the Courts below it appears to have been considered that because they had raised wet crops on their lands prior to the settlement by means of achukattus, the fact that they went on doing so after the settlement had come into force would not amount to a conversion within the meaning of the reservation. In their Lordships' opinion the fact that wet crops may have been raised on these lands prior to the settlement is not the governing consideration. It is no doubt the fact that when at the settlement these lands were registered as dry and assessed accordingly, the revenue authorities knew that wet crops had been raised upon them by means of achukattus, but for reasons already given they regarded this method of cultivating this particular land as objectionable, and thought that they were in a position to check it and make the pattadars revert to dry cultivation by dealing with them in the manner referred to in the Notification, that is, by imposing the statutory water-cess, probably at increasingly penal rates. That method was found to be illegal and the water-rate so levied was refunded. The fact, however, remained that on lands which had been ordered to be retained as ordinary dry, and which had been registered as dry and assessed accordingly, the plaintiffs had raised wet crops. In their Lordships' opinion this raising of wet crops on land registered at the settlement as dry was a conversion within the meaning of the reservation. So long as they cultivated the land as dry the pattadars were entitled to hold the lands for the whole period of the settlement at the rate assessed on them as such, but when they proceeded to raise wet crops upon them they effected a conversion and justified the revenue authorities in imposing upon them "corresponding wet assessment" by which their Lordships understand the appropriate wet rates.

For these reasons their Lordships are of opinion that the fresh imposition of these wet rates *minus* the dry rates already paid did not give the plaintiffs any cause of action, and that, therefore, the decrees of the lower Courts should be set aside and the suits dismissed, but without costs, and there will be no order as to the costs of this appeal. Their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *Solicitor, India Office.*

Solicitors for respondents : *Chapman, Walker & Shephard.*

K.J.R. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the Central Provinces.]

PRESENT:—LORD PHILLIMORE, LORD CARSON AND SIR LANCELOT SANDERSON.

Ramkisan Singh and others .. *Appellants** (*Defts.*)

v.

Mohammad Abdul Sattar and others .. *Respondents* (*Plffs.*).

P. C.

Ramkisan Singh v. Md. Abdul Sattar.

Civil Procedure Code (*V of* 1908), *Sch. III, para* 11—*Mortgage effected without the permission of the Collector—Joint Hindu family, personal liability of minor member on mortgage executed by the* karta *and adult members of the family.*

In execution of a money decree eight villages belonging to the judgment-debtor were attached by the Civil Court, and the proceedings were then transferred to the Collector to be carried on under the provisions of Schedule III of the Civil Procedure Code, 1908. The Collector was admittedly acting only under paragraph 1 of Schedule III and dealt with none of the property of the judgment-debtor but the eight attached villages, and no action was ever taken under paragraph 2 and the following paragraphs of the schedule. The judgment-debtor, meanwhile, on the 5th September, 1916, executed a mortgage in favour of the plaintiff, the property mortgaged consisting of four out of the eight attached villages, and three others that were not under attachment. In a suit brought by the plaintiff for foreclosure of the mortgage, it was pleaded that the *whole* mortgage was void in that the judgment-debtor was incompetent under paragraph 11 of Schedule III to mortgage any part of his property on the 5th September, 1916, because on that date the Collector *could* exercise all the powers conferred on him by the first ten paragraphs of that schedule in respect of the whole of the judgment-debtor's property. The Judicial Commissioners, Central Provinces, *held,* [relying on *Gaurishankar Balmukund* v. *Chinnumiya,* (1918) L.R. 45 I.A. 219: I.L.R. 46 Cal. 183: 35 M.L.J. 733 (P.C.)] that by virtue of the provisions of paragraph 11 of Schedule III of the Code of Civil Procedure, the mortgage in question being effected without the permission of the Collector was void *qua* the four attached villages, but that it was not vitiated with respect to the three villages which were not attached by the Civil Court. "If the Collector deals with the attached property only under paragraph 1 of Schedule III and takes no action and begins no proceedings under paragraph 2, he can exercise or perform any of the powers or duties conferred or imposed on him by that schedule only in respect of that part of the judgment-debtor's property that is under attachment. It is clear then that the judgment-debtor was not incompetent to mortgage the three villages which were not under attachment" (*per* Baker and Hallifax, J.Cs.). On appeal to the Privy Council, their Lordships concurred with the learned Judicial Commissioners in holding that the mortgage of the *attached* properties was bad.

---

*P.C. Appeals Nos. 2 and 3 of 1927. 15th March, 1928.

P. C.
Ramkisan Singh v. Md. Abdul Sattar.

The *karta* and other adult members of a joint Hindu family raised money for legitimate family purposes by a mortgage of the joint property. The mortgage-deed contained a personal covenant by the mortgagors to repay the debt. In a suit brought by the mortgagee to enforce the mortgage against the mortgagors and also another member of the family (a son of one of the mortgagors, who was not a party to the mortgage, being then a minor), the Court below (the Judicial Commissioners of Central Provinces) passed a personal decree against the defendants for repayment of the money lent. On appeal, their Lordships of the Privy Council varied the decree of the Court below by limiting the liability of the *quondam* minor to his interest in the joint family property; so that 'neither will there be any personal liability against him nor will he be liable in respect of any property separately acquired, if any.'

Consolidated Appeals Nos. 2 and 3 of 1927 from a judgment and decree, dated the 31st January, 1924, of the Court of the Judicial Commissioner, Central Provinces (Messrs. Baker and Hallifax), which varied a decree of the District Court of Nagpore, dated the 21st August, 1922.

For purposes of the report, the facts are briefly summarized in the *head-note*.

Lowndes, K. C. and *Jardine* for appellants.

De Gruyther, K. C. and *Parikh* for 1st respondent (Mohammad Abdul Sattar, the plaintiff).

Dunne, K. C. and *Abdul Majid* for respondents (Mathuradas and Gopaldas).

15th March, 1928. The judgment of their Lordships was delivered by

Lord Phillimore.

LORD PHILLIMORE.—Their Lordships have given full consideration to the various points which have been raised in this case; some of them are points of small importance; others are, no doubt, of considerable weight, having regard to the interest of the parties; but their Lordships are prepared to deal with them shortly as, indeed, the considerations which lead them to their conclusion are not many or very involved.

First of all, dealing with the respondents who are represented by Mr. Dunne, the respondents Mathuradas and Gopaldas, they are, no doubt, made respondents by the appellants, the Singhs, in their appeal, because they were parties to the suit, having been made parties to the suit by the plaintiff, and, therefore, they had to be made parties to the appeal; but they would obviously not have required to come here if it had not been for the application made in the cross-appeal or for fear of some application. As against them there is no case.

P. C.
Ramkisan Singh v. Md. Abdul Sattar.
Lord Phillimore.

It has been argued by the plaintiff, cross-appellant, that he could support the mortgage to him of the attached properties, though the properties were under attachment, because he could ask the Board to accept the view that there had been permission given by the Collector; but it is clear that there was no such permission and, indeed, it is a matter of fact which has been found by both Courts in India. Therefore, the mortgage, being a mortgage of the attached properties, was a bad mortgage and the plaintiff's title cannot prevail against those respondents.

It was suggested and the view was taken by the District Judge that the mortgage might still stand as regards the two sons, because they were not in form sued as defendants; but the suit was against the whole family property and the whole family property was attached, the whole 16 annas, and the whole 16 annas were, therefore, within the Code of Civil Procedure, paragraph 11 of Schedule III, and the mortgage was therefore bad and the subsequent transaction with Mathuradas and Gopaldas was a good one and must stand and they are entitled to be dismissed from the appeal with costs, and the costs must be paid by the plaintiff, the cross-appellant.

As regards the main appeal by the three Singhs, when the matter comes to be thrashed out there is no merit in the appeal *quoad* the father and the elder of the two sons. There was clearly a personal covenant to pay the debt and the judgment of the Court of the Judicial Commissioner in respect of the remedy was one which the Appellate Court could have given and the only thing that the appellants can successfully maintain is that they should have the decree varied by limiting the liability of Lachman Singh, the younger son, who was a minor at the time of the mortgage, to his interest in the joint family property; so that neither will there be any personal liability against him nor will he be liable in respect of any property separately acquired, if any.

As to the cross-appeal, there really was nothing that could be supported in it until it came to the ingenious suggestion made late in the case that the appellant was entitled to an order for sale of the unattached villages under the Code of Civil Procedure, Order 34, Rule 4 (2), which is "In a suit for foreclosure, if the plaintiff succeeds and the mortgage is not a mortgage by conditional sale, the Court may, at the instance of the plaintiff" or others "pass a like decree," which is a decree for sale in lieu of a decree for foreclosure. It is suggested now that this mortgage was not a mortgage by condi-

P. C.

Ramkisan Singh v. Md. Abdul Sattar.

Lord Phillimore.

tional sale and that the plaintiff is entitled to have such a decree as he now asks for.

Their Lordships would hesitate a great deal before they determined that this was not a mortgage by conditional sale, because, whatever may be the appearance of the document, there have been a great number of authorities on mortgages by conditional sale and it would take a great deal of examination before it could be determined that this was not such a mortgage. The parties throughout the case have treated it as a mortgage by conditional sale; it was so alleged by the defendants in their written statement; no objection was taken by the plaintiff in reply; no issue was stated about it; the District Judge assumed it and their Lordships do not find that any complaint was made of his assumption in the Court of the Judicial Commissioner. Therefore, their Lordships would be very unwilling to decide, without a great deal of further examination, whether this was a mortgage by conditional sale or not; but, however that may be, to allow the plaintiff at this eleventh hour, having never asked for this remedy either before the District Judge or in the Appellate Court or by his case as originally printed, to get such a remedy, without very careful examination as to what the effect might be upon third parties who are not present here, would be contrary to all reasonable procedure. Their Lordships cannot, therefore, grant that application nor the other points made by the cross-appeal. The result is that the cross-appeal will be dismissed.

On the whole, as between the Singhs and the plaintiff, their Lordships think there ought to be no costs either of the appeal or of the cross-appeal. The result will be that the only costs which have to be paid will be those of Mathuradas and Gopaldas in the two consolidated appeals, which will have to be paid by the plaintiff.

Their Lordships will humbly advise His Majesty accordingly that the judgment of the Court of the Judicial Commissioner should be varied in favour of the appellant Lachman Singh in the manner already indicated, and that the respondents Mathuradas and Gopaldas be paid their costs by the cross-appellant, and that no further or other Order need be made.

Solicitors for appellants: *Valpy, Peckam* and *Chaplin*.

Solicitors for respondents: *H. S. L. Polak, Francis* and *Harker*.

K.J.R. *Appeal allowed in part.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Sierra Leone.]

PRESENT:—THE LORD CHANCELLOR, LORD BUCKMASTER AND LORD WARRINGTON OF CLYFFE.

William Edward Akaje Macauley .. *Appellant**

v.

The Judges of the Supreme Court of Sierra Leone and another .. *Respondents.*

P. C.

W. E. A. Macauley v. The Judges of the Supreme Court of Sierra Leone

Professional misconduct—Barrister whilst holding another Barrister's brief, exacting higher fee from client

When a Barrister hands over his brief to another Barrister at a fixed fee, the former does not thereby entirely go out of the case. The handing over of the brief is not tantamount to a transfer of the case to the second Barrister, so as to make it exclusively his own case He merely holds the brief for the first Barrister at the fee agreed upon between them, and he would be guilty of most unprofessional conduct if he were to take the opportunity, whilst "devilling" for another Barrister, of going behind that Barrister's back and extorting a *higher* fee from the lay client.

Appeal No. 14 of 1928, by special leave, from a judgment and order of Mr. Justice Purcell, Chief Justice of the Colony of Sierra Leone, dated the 20th April, 1927.

The sole question for determination by the Privy Council was whether the learned Chief Justice was right in ordering the name of the appellant, a Barrister-at-Law, to be struck off the roll of the Supreme Court of the Colony of Sierra Leone.

The material facts of the case appear from their Lordships' judgment.

Glanfield for appellant.

Cripps, K. C. and *Pocock* for respondents.

18th May, 1928. Their Lordships' judgment was delivered by

Lord Warrington.

LORD WARRINGTON OF CLYFFE.—This is an appeal from an order dated the 20th April, 1927, of the Chief Justice of the Colony of Sierra Leone, whereby it was ordered that the name of the appellant should be removed from roll of Barristers and Solicitors of the Supreme Court of the Colony.

By an order of His Majesty in Council made on the 20th December, 1927, on the petition of the appellant, it was ordered that the appellant should be granted special leave to appeal in *forma pauperis.*

---

*P.C. Appeal No. 14 of 1928. 18th May, 1928.

P. C.

W. E. A. Macauley v. The Judges of the Supreme Court of Sierra Leone.

Lord Warrington.

The appellant is a native of the Colony. He was called to the English Bar by the Honourable Society of Lincoln's Inn on the 26th January, 1923. He then returned to the Colony and was duly enrolled as a Barrister and Solicitor of the Supreme Court. In the Colony the two branches of the profession are united.

By the Supreme Court Ordinance of 1924, it was by section 57 provided that the Chief Justice should have power for reasonable cause to suspend any Barrister or Solicitor from practising within the jurisdiction during any specified period or order his name to be struck off the roll of the Court. The order appealed from was made under this provision.

On the 4th February, 1927, the appellant was, at the instance of the Acting Attorney-General of the Colony, served with a notice of motion and certain affidavits in support thereof, calling upon him to show cause why the Chief Justice should not in the exercise of the power aforesaid, order his name to be struck off the roll of the Court or suspend him from practising within the jurisdiction of the said Court upon the grounds:—

(*a*) That after having accepted and agreed to hold a brief on behalf of the Hon. Claude Emile Wright, Barrister-at-Law, to represent the defendant in the case of *Macarthy* v. *Pa Kaini* then pending in the Circuit Court at a fee of 20 guineas, the appellant did on or about the 10th June, 1926, without any just reason and cause receive and obtain from the said Pa Kaini a certain large sum of money to wit, the sum of £135 for or in respect of his appearance on behalf of the Hon. Claude Emile Wright in the said proceedings, contrary to good conscience and honest dealing and without the authority of the said the Hon. Claude Emile Wright.

(*b*) That being briefed as aforesaid to defend Pa Kaini in the Circuit Court, the appellant did on or about the 1st July, 1926, demand from the said Pa Kaini a further sum of £200 for his services in connection with the appeal to the Full Court then pending and did by the said demand induce the said Pa Kaini to deliver to him an additional sum of £50 without the knowledge and authority of the said the Hon. Claude Emile Wright and without being authorised by the said the Hon. Claude Emile Wright to appear on his behalf in any appeal from the judgment of the Circuit Court.

The motion was heard by the Chief Justice on the 4th, 5th and 7th April, 1927, on evidence, both oral and by affidavit,

P. C.
W. E. A. Macauley v. The Judges of the Supreme Court of Sierra Leone.
Lord Warrington.

and on the 20th April, 1927, he delivered his judgment and made the order now under appeal.

Certain technical objections to the order were raised, both before the learned Chief Justice and before the Full Court on an application for leave to appeal. These objections were overruled and leave to appeal was refused. These objections were not pressed before this Board and the learned Counsel for the appellant, who conducted the case with admirable tact and discretion, and said all that could be said on his client's behalf, confined himself to an attack upon the order on the merits.

The following facts were either admitted or proved to the satisfaction of the Chief Justice. Prior to the 8th June, 1926, Claude Emile Wright, a leading Barrister and Solicitor at Free Town, and a member of the Legislative Council of the Colony, had been instructed by the defendant to act for him in the action abovementioned and had agreed to accept a fee of 30 guineas for so doing. Mr. Wright had received no instructions from Pa Kaini, his client, except the writ and particulars of damage.

On the 8th June, 1926, Mr. Wright, finding that the case was to come on for trial in the Circuit Court at Moyamba in a day or two, and that he would be unable to undertake the defence himself as he had to attend a meeting of the Legislative Council, sent for the appellant, whom he knew as a son of his chief clerk, and asked him to hold the brief for him at a fee of 20 guineas. These terms were accepted by the appellant and he went to Moyamba accordingly.

Mr. Wright, at the same time sent a telegram to his client in these terms: "Macauley representing me proceeds to Moyamba for your case. Please pay him retainer, 30 guineas." The appellant at the hearing admitted having seen this telegram, but stated that he did not remember its contents.

The appellant contended before the Chief Justice, and repeated this contention before this Board, that Mr. Wright had transferred the case to him, that it was then exclusively his own case and that the relation of solicitor and client existed between himself and Pa Kaini, Mr. Wright being no longer concerned in the matter at all.

As to this point the learned Chief Justice on the evidence before him arrived at the following conclusions of fact:—

"I am unable to take the view that Mr. Wright ever handed over this case to Mr. Macauley in the sense that he entirely went out of the case and Mr. Macauley came into it," and again, "It is to my mind clear

beyond all possible doubt that Mr. Macauley with full knowledge of his exact position entered on this transaction on one footing only and that was that he went to Moyamba to hold Mr. Wright's brief for him in the Circuit Court in the action of *Macarthy* v. *Pa Kaini* and agreed to accept 20 guineas for so doing."

There was ample evidence to support these findings and no sufficient reason was alleged for rejecting them, but their Lordships feel it right to add that, having read the evidence, they concur in the findings. The second of the two findings that Mr. Macauley entered on the transaction with full knowledge of his exact position disposes of his contention before this Board that he honestly believed that the case was his own, whether it were so in fact or not.

Before stating what happened at Moyamba, it is right to say something of the nature of the action because the appellant has sought to justify his subsequent conduct by the suggestion that the case was one of great importance and difficulty, involving a heavy claim—upwards of £4,000—against the defendant and that the fee of 30 guineas was altogether insufficient.

The judgment of the Circuit Judge was delivered on the 12th June, the case having been opened on the 11th June. From this it appears that the plaintiff was a small trader in the defendant's village and sued for damages on the allegation that the defendant as paramount chief had wrongfully interfered with his trade by picketing the plaintiff's shop and forbidding his people to trade with him. The defence was that the defendant's conduct was justified by the failure of the plaintiff to pay the settlers' fees. The Circuit Judge after stating that the facts of the case were simple and largely not disputed, found that the defence was established and gave judgment for the defendant. The Judge added a comment on the exaggeration of the claim for loss of profit—at the rate of £12 a day, exclusive of Sundays—nearly £4,000 per annum in respect of a small general store in a village of 15 to 20 houses containing at least two other traders.

The appellant has given several accounts of what happened at Moyamba. The main difference between them being on the question whether he, the appellant, asked for a further fee or whether this was voluntarily offered by the Chief. On this point the learned Chief Justice said:

"I entertain no doubt that Mr. Macauley sought the interview at Moyamba and demanded 300 guineas. I entirely reject his assertion that the offer of a further fee came from Pa Kaini and that so to speak this

P. C.
W. E. A. Macauley v. The Judges of the Supreme Court of Sierra Leone.
Lord Warrington.

money was almost forced upon him, the evidence to my mind absolutely refutes any such version of the matter"

Their Lordships accept this finding also, but whatever may be the precise circumstances, there is no doubt that the appellant required a further fee of 300 guineas which, at the request of the Chief and his followers, he reduced to £250 of which they paid him £105 with a further sum of £30 for expenses, making together £135, leaving £145 still owing in respect of the fee. The Chief was a native, entirely illiterate and unfamiliar with such matters as those with which he was dealing. The appellant has sought to justify his request for the large further fee by the amount of work he says he had to do. It only amounts to this that, inasmuch as neither Mr. Wright nor himself had received any preliminary instructions, he had to ascertain the facts of the case on the spot. As appears from the judgment of the Circuit Judge, the facts were simple and largely admitted. Their Lordships are not impressed by this excuse on the part of the appellant.

On his return to Free Town, the appellant went to see Mr. Wright and reported the result of the case. Mr. Wright then asked whether he wanted the balance of his fees as Pa Kaini had sent him (Mr. Wright) £20. The reply was to the effect, that he did not want the balance as they had made him a very handsome present. The appellant said nothing to Mr. Wright as to the case having been made over to him or as to his transactions with the Chief in reference to the fee, and in fact Mr. Wright knew nothing of what had taken place until he heard of the facts through the District Commissioner in August.

In their Lordships' opinion, the first of the two charges was fully established, and it is clear that the appellant made use of his pretended position as solicitor in the case to the exclusion of Mr. Wright to obtain from an ignorant and unsophisticated native the promise of a fee out of all proportion to the importance of the case and the work done by him, and payment on account of £105 with the further sum of £30 for his expenses at the rate of £5 a day for six days.

As to the second charge, the facts are that, on the 5th July, the appellant went to Mafengre where Pa Kaini lived and saw him and his nephew, Kapr Massim, and demanded a further fee of £200 for conducting an appeal which he said had been commenced. This demand was made on the same pretence that the case had been transferred to him. On this occasion, the

Chief paid him the further sum of £50 mentioned in the second charge.

On the 19th July the appellant wrote a letter to Pa Kaini in which he demanded a further sum of at least £50 on account of the promised fee of £200 in respect of the appeal. In the course of that letter he said, "you must realise that I have a great deal to do in the matter and I wish to be refreshed now and again." As a matter of fact, he had no work whatever to do in connection with the appeal. The further £50 was not paid.

At some time—but whether before or after the date of this letter is not quite clear—he was distinctly informed by Mr. Wright that he (Mr. Wright) was acting in the appeal. It is apparently still pending and in it Pa Kaini is represented by Mr. Wright. Since the 19th July, as well as before that date, the appellant has had no work to do in connection with the appeal.

Their Lordships are of opinion that the second charge also was fully established and that the learned Chief Justice had "reasonable cause" for the exercise of the power conferred upon him by clause 57 of the Ordinance.

A strong appeal was made by Counsel for a change of the sentence from one of removal from the roll to one of suspension only.

No doubt the sentence is a severe one as it deprives the appellant of the means of livelihood to which he has devoted much study and expense. But the learned Chief Justice is necessarily more familiar with the position of affairs in the Colony than are their Lordships.

In the course of his judgment he makes use of the following expressions:—

> "It is a startling proposition and one which I cannot for a moment assent to that people holding the peculiar views which Mr Macauley apparently does hold with regard to the relation or otherwise of solicitor and client should be allowed to run loose especially in such 'an Alsatia' as the Sierra Leone Protectorate without being answerable to any authority for their professional conduct."

Their Lordships appreciate the necessity in a country so described of inducing the inhabitants to resort to the Courts for the settlement of their disputes rather than to the possibly more familiar means of personal violence. For this purpose it is essential that the people should be brought to feel the greatest respect not only for the impartiality and independence of the tribunals, but for the honesty and fairness of those who practise

P. C.

W. E. A. Macauley v. The Judges of the Supreme Court of Sierra Leone.

Lord Warrington.

before them. To use the Chief Justice's words, the circumstances disclose "a disgraceful combination of rapacity and dishonesty" and their Lordships feel that if they were to recommend a mitigation of the sentence in this case, they would be dealing a serious blow at the authority of the Judge entrusted by law with the discipline of the profession in the Colony.

Their Lordships, however, cannot part with the case without commenting on one part of the judgment of the learned Chief Justice. He expressed the view that it ought to be inferred that the appellant and Kapr Massim were co-operating in obtaining the money in question from Pa Kaini. From the evidence before their Lordships they do not think such an inference should be drawn; enough, however, was proved without it to justify the order.

For the above reasons their Lordships will humbly advise His Majesty that the appeal ought to be dismissed, but, as the appellant appeals in *forma pauperis,* without costs.

Solicitors for appellant: *Leader, Plunkett* and *Leader.*

Solicitor for respondents: *Burchells.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT :—VISCOUNT SUMNER, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Sri Raja Rao Sri Swetachalapati Ramakrishna Ranga Rao Bahadur Garu, Raja of Bobbili .. *Appellant** (*Deft.*)

v.

Ayyagari Sodemma .. *Respondent* (*Plff.*).

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

*Suit for possession of immoveable property—Limitation—*Onus probandi.

In a suit to recover possession of immoveable property, *held,* that the onus was on the plaintiff to establish that the suit was brought well within the period of limitation

Held, also, that the plaintiff had failed to discharge such onus.

Appeal No. 120 of 1925 from a judgment and decree of the High Court, Madras (Spencer and Devadoss, JJ.), dated 7th September, 1922, reversing a decree of the Court of the

---

*P.C. Appeal No. 120 of 1925. 14th June, 1928.

P. C.
Raja of Bobbili v. Ayyagari Sodemma.

Subordinate Judge of Vizagapatam, dated the 17th December, 1919.

Dunne, K. C. and *K. V. L. Narasimham* for appellant.

De Gruyther, K. C. and *Subba Row* for respondent.

14th June, 1928. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—The only question for their Lordships' decision in this appeal is whether the istuva or parcel of land known as Nyallapollam in Sankili village of the Bobbili zemindari in the Madras Presidency, which is claimed by the plaintiff, was taken possession of in 1880, together with another istuva in the same village known as Chellakapollam, by the adoptive mother of the first defendant, the Maharaja of Bobbili, as security for the discharge of certain debts incurred by the plaintiff's deceased husband to the estate and to the local temple. Unless this be established, the plaintiff's suit is admittedly barred, and her rights in this istuva have long been extinguished under the law of limitation.

The Maharaja of Bobbili was the first and principal defendant, but in January, 1917, an order was made in this suit on the plaintiff's petition that "the present Raja of Bobbili" should be made a supplemental twenty-fourth defendant, the Zemindari having apparently devolved upon him in the lifetime of the first defendant, and he appears henceforth as the contesting defendant, and will be referred to as the defendant.

It is now common ground that when accounts were settled in 1905 and the debts fully discharged, the plaintiff was given possession of Chellakapollam only, and not of Nyallapollam; but there was also a question in this suit as to whether the whole of Chellakapollam was then returned to the plaintiff. Both the lower courts held that the plot sued for formed part of Chellakapollam, and the High Court further found that the plaintiff was entitled to sue for it as the separate property of her deceased husband. These findings were not questioned before their Lordships.

It was admitted in the first defendant's written statement that Chellakapollam had been granted to the plaintiff's husband, Ayyagari Varahalu, who was the estate sheristadar, and that it had been intended to grant him Nyallapollam and other lands as well; but it was alleged that he had acted prejudicially to the Samasthanam, and that, according to the custom of the Samasthanam and to the nature of the grant, as the suit lands were

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

Sir John Wallis.

not absolute inams, the grant relating to Nyallapollam and the other lands was not given effect to and was stopped, and these lands had been entered under jeroyiti and in the enjoyment of the first defendant and his ancestors for the last 50 years. Chellakapollam, it was said, had been left in Varahalu's possession out of grace.

As regards the lands handed over as security in 1880, it was alleged that in 1875 Varahalu and his brothers had become indebted to and had obtained from the Samasthanam a loan to discharge their debts, and that in 1880 the usufruct of Chellakapollam was assigned to the Samasthanam, but it was denied that the assignment was made by the plaintiff.

This plea was intended to raise the question whether these istuvas were the self-acquisition of the plaintiff's husband or joint family property, as in the latter case the plaintiff would not be entitled to maintain this suit. That issue has been decided in the plaintiff's favour by the High Court both in this suit and in a suit brought against her by members of the joint family and tried together with this suit. The plaintiffs in that suit have not appealed to His Majesty in Council, and in these circumstances, Mr. Dunne, who appears for the appellant, has not questioned this finding before their Lordships.

It was further alleged in the written statement that as the plaintiff was the last heir of the mortgagees, accounts were settled with her and the Chellakapollam lands handed over to her on her executing an indemnity bond against claims by her husband's relations, paying the balance found due, and executing a receipt for the lands handed over. Lastly, it was alleged that ten years were allowed to lapse before the plaintiff made any further claim.

The issues which are now material were as follows:—

(1) Whether the suit lands belonged to the plaintiff's husband and whether the same were assigned by plaintiff to first defendant's mother, as in the plaint alleged, for a debt due to her.

(2) If not, is the suit within time?

As already stated, their Lordships are only concerned with these issues in so far as they relate to the Nyallapollam istuva, and unless that istuva was made over as security to the first defendant's adoptive mother in 1880, the plaintiff's claim to it is admittedly barred by limitation.

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

Sir John Wallis.

The plaintiff was unable to produce any documents of her own in support of her case, a disability she accounted for by the fact that there had been a dacoity in her house about the year 1880, when she lost gold, silver and documents. The stolen boxes were recovered, but not the documents. Her son-in-law and second witness, however, produced copies of grants to her husband of the Chellakapollam istuva in 1856 and of the Nyallapollam istuva in 1858, and also a copy of an earlier grant, as to which no question arises, which he stated the plaintiff's nephew and agent obtained and kept in his custody. The accuracy of the copies was admitted for the defence and they were exhibited accordingly.

Otherwise, apart from the oral evidence, which is not of much value, the case has to be decided on inferences founded on documents coming from the defendant's custody, which have been exhibited on one side or the other, and on any inferences that may arise if it be found that the defendant has failed to produce documents which he ought to have produced.

On this evidence the Subordinate Judge of Vizagapatam, who, unfortunately, was not the Judge who took the evidence, and the Madras High Court on appeal, held that both istuvas had been granted to the plaintiff's husband, and that the defendant's accounts showed that the plaintiff's husband had been in possession and enjoyment of them down to the year 1863. This is not now disputed by the defence. Both Courts also rejected the defendant's case that his accounts showed that the grants were resumed in 1863, in consequence of Varahalu's misconduct, and that from 1863 to 1872 Nyallapollam was in the private enjoyment of the Rani and was then incorporated in the zemindari estate.

It was proved, and is not disputed, that the plaintiff's husband held the office of sheristadar after the alleged resumption down to the time of his death in 1876, and also that the Chellakapollam istuva was left in his possession. In these circumstances both Courts arrived at the conclusion that it might safely be inferred that he continued in possession of the Nyallapollam istuva also as the defendant had failed to show he did not, and consequently that both istuvas were in possession of his heirs in 1880, when the Rani directed that possession should be taken of his Sankili manyam and the income applied in reduction of his indebtedness to the estate and the local temple.

P. C.
Raja of Bobbili
v.
Ayyagari Sodemma.
Sir John Wallis.

At this point the two Courts differed. The Subordinate Judge, on a very careful examination of the evidence and the conduct of the parties, found that between the years 1880 and 1905, when Chellakapollam was handed back to the plaintiff, the debts for which it had been taken over were discharged exclusively out of the revenues of Chellakapollam, that this must have been well known to the plaintiff and her agents, and that she made no claim to Nyallapollam when Chellakapollam was handed over to her in 1905, or for eight years afterwards. Nyallapollam he appears to have held was not then taken possession of under the Rani's hukum, but remained in the plaintiff's enjoyment until 1885, when it was incorporated with the defendant's estate without any objection on the part of the plaintiff, with the result that time began to run against her from that date. He therefore held that, as regards Nyallapollam, the plaintiff's suit was barred, and dismissed it accordingly.

When the case came before the High Court on appeal the learned Judges arrived at the conclusion that as, according to their finding, both istuvas were in the plaintiff's possession in 1880, both were taken over by the first defendant's mother; and they attached little or no importance to the subsequent evidence as to the conduct of the parties, because, to put it shortly, in their opinion the Zemindar was in a position to do what he pleased and the plaintiff was not in a position to do anything. In their Lordships' opinion it cannot lightly be assumed either that any large landowner in the position of the first defendant would deal oppressively with the widow of an old servant of the family, or that, if he did so, the widow would be wholly without redress.

What the plaintiff has to prove, to avoid the bar of limitation, is that Nyallapollam manyam, as well as Chellakapollam manyam, was taken over as security for her husband's debts under the Rani's hukum of the 7th April, 1880 (Exhibit 9), which is at least as consistent with one manyam being taken over as with two. The defendant's case is that the Nyallapollam manyam was not in the plaintiff's possession at the date of the hukum and cannot, therefore, have been taken over as security, that it was never treated, as forming part of the security, and that until this case was brought no one ever suggested that it was. These latter facts, if established, cannot be disregarded in determining the main issue, whether Nyallapollam was taken over as security in 1880.

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

Sir John Wallis.

Their Lordships will consider in the first place the terms of the hukum and the evidence as to what was done under it before coming to the question whether Nyallapollam had been resumed from Varahalu, the plaintiff's husband, before 1880.

"Hukum (order) issued by M.R.Ry. Raja Lakshmi Chellayamma Bahadur Rani Garu of Bobbili Estate, etc., to the Sheristadar Ramakuri Venkata Rao Pantulu Late Ayyagari Varahalu Pantulu and others are heavily indebted by thousands of rupees to the sircar and to Sri Swamivaru. Though there has been default in respect of several instalments of the bonds already presented, it appears that Narasaraju (Varahalu's brother) and others have neither paid nor ascertained the debt and executed mortgage deeds afresh, and that they wickedly intend alienating the entire property towards other debts and evading (this payment) of this debt. So you should, immediately on the receipt of this order, send for the ryots who cultivate the Sankili manyam of the said Narasaraju and others, to the cutcherry, obtain Kadapas in respect of the said manyam, and get the profits thereof credited in every year towards the said debt.

"Wednesday, the 13th day of Palguna Bahulam of Pramadi, corresponding to 7th April, 1880.

(Signed) "SREE,
"Sree Rani of Bobbili.

(Signed) "APPIAH GARU,
"Dewan of Bobbili."

This hukum may be open to criticism as a high-handed action, but there does not seem to be any reason for attributing to the Rani any ulterior motive beyond the collection of the debts owing to the estate and the temple. Their Lordships observe in this connection that R. Venkata Rao, the sheristadar to whom the hukum was addressed, about this time married his son, the plaintiff's second witness, to the plaintiff's daughter and heiress, and it therefore became his interest during his remaining years of office to see, as far as he could, that the plaintiff was not unfairly treated.

The lands are described in the hukum "as the Sankili manyam of the said Narasaraju" (the brother of the plaintiff's deceased husband), it being apparently assumed that they belonged to the joint family and not to the widow. Now both Chellakapollam and Nyallapollam were or had been manyams, that is, inams, in Sankili village. Strictly speaking, manyam is the singular and manyalu the plural; but according to the evidence manyam itself was also used in a plural sense, and may therefore have included both manyams or only one. But for this unfortunate ambiguity the present case might not have arisen.

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

Sir John Wallis.

Now as to what was done under this hukum, their Lordships, after full consideration of the arguments addressed to them, entirely agree with the finding of the Subordinate Judge, from which the High Court do not expressly dissent, that both the debts and the allowances made by subsequent hukums to the family of the plaintiff's husband and to the plaintiff herself were met out of the revenues of Chellakapollam alone, and that the plaintiff and her advisers must have been aware of this. The revenues of both manyams must have been perfectly well known to the plaintiff and to her agent and nephew, to say nothing of her son-in-law's father, the sheristadar; and it must have been apparent to them on the two occasions when accounts were settled, in 1892 and 1905, and the bonds given by the plaintiff's husband discharged, that she had only been credited with the revenue of Chellakapollam and not of Nyallapollam. The revenue in paddy and money of Nyallapollam, according to the evidence, was not at the date of the grant inferior to that of Chellakapollam, and it is quite clear that if that revenue had been applied in satisfaction of the debts in addition to the Chellakapollam revenue and without the heavy deductions made from the latter for the allowances to the plaintiff and her husband's family, the total indebtedness must have been discharged long before 1905, and there could have been no balance of over Rs. 800 payable by the plaintiff to entitle her to get back Chellakapollam.

The estate accounts, to which the Subordinate Judge refers as appropriation accounts, show that there were two bonds, of which one was discharged on or before the 5th February, 1892, by payments amounting to Rs. 2072-5-8, and given back to the plaintiff's agent, who signed for it, while the other was discharged by payments of Rs. 2,768-13-0, including a final payment in 1905 of Rs. 825-5-9 by the plaintiff's agent on her behalf. This balance is struck on the back of the second bond (Ex. A), and it would have been perfectly easy for the plaintiff's agent to check the figures. The way in which the bonds were discharged is fully shown in the estate accounts, and it is unlikely that the plaintiff's agent would have signed on her behalf the receipt (Exhibit 1) of 2nd October, 1905, without looking into them. The receipt is as follows:—

"Receipt presented by Kapavarapu Narasimhaswami Pantulu, agent on behalf of Sodemma Garu, wife of late Ayyagari Varahalu Pantulu Garu.

"As I have on 7th September, 1905, discharged in full the debt due under the bond executed on 27th October, 1875, by late Varahalu Pantulu

and others, Chelikani Chandrayya Doragaru, Amin of Kayiti tana, has this day delivered to my possession the inam lands which are known as Chellakapollam istuva which were assigned towards the discharge of the said bond debt and which bear G. 8—16 and Rs. 42-14-0 cash appanam per annum, which are comprised within the boundaries mentioned hereinbelow."

Their Lordships entirely agree with the Subordinate Judge that the conduct of the plaintiff and her agents on this occasion is entirely inconsistent with her present case, that she knew she was entitled to recover Nyallapollam as well, and are quite unable to accept her evidence that she asked for it at the time. As already stated, it was on this evidence alone that the Subordinate Judge found that Nyallapollam was not given as security in 1880, even though, in his opinion, Nyallapollam was then and for some time afterwards in the plaintiff's possession.

Their Lordships will now proceed to deal with the evidence as to whether Nyallapollam was in possession either of the plaintiff herself or her husband's family when security was taken under the hukum of 1880, as unless that is shown her suit is barred.

Exhibit III is the grant to Varahalu of Chellakapollam in 1856. What was granted was land "bearing," that is to say, producing, a grain rent of 6 garces of paddy and a money rent of Rs. 19-11-1. The grantee was to increase the yield if he could, and was to pay the Raja a fixed kattubadi or quit rent of Rs. 3 only. The grant of Nyallapollam (Exhibit D) in 1858 described the land as producing a grain rent of 6 garces and 27 putties of paddy and a money rent of Rs. 22-11-0. The grantee was to increase the yield if he could and was to pay the Raja a fixed kattubadi of Rs. 3-8-0 only. It appears from the terms of Exhibit D that these 6 garces and 27 putties were local measure and were equivalent to 6 garces in sikka or Government measure.

There is no dispute now that Varahalu was in enjoyment of both grants down to 1862 or 1863. The defendant has put in the kattubadi diary of the estate from 1816 to 1883, and exhibited an entry of the 3rd September, 1863 (Exhibit XIX), in the following terms:—

"Ayyagari Varahalu Pantulu not having conducted himself according to the will and pleasure of the *Sircar* (Raja) and the *Manyam* lands newly assigned by the *Sircar* in the villages mentioned hereinbelow having been resumed and annexed to the Estate by the *Sircar*, the amount excused for

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

Sir John Wallis.

the year *Dundubhi* (1862-63), as *per* letter, dated Thursday, the 6th Niya of *Sravana Bahulam* of the year *Rudhirodgari* (3-9-1863) (is) :

Rs.	A.	P.	
7	0	0	Relating to the Khandayam Manyam.
6	8	0	Relating to the Sankili Manyam.
2	4	0	Relating to the Javam Manyam.
3	0	0	Relating to the Regidi Manyam.
18	12	0	

This entry undoubtedly records a remission of kattubadi or quit rent to Varahalu in consequence of his manyams having been resumed by reason of his not having conducted himself in accordance with the will and pleasure of the Raja. The kattubadi remitted in respect of the Sankili manyam, a word which, as already stated, includes the plural as well as the singular, was Rs. 6-8-0, that is to say, the amount of the kattubadis of Rs. 3 and Rs. 3-8-0, reserved in respect of the Chellakapollam and Nyallapollam grants in Sankili village. The entry therefore proceeds on the footing that both grants had been in fact resumed, whether the Raja had or had not any right to resume them. It is not shown that there was any subsequent payment of kattubadi under either grant.

There is no documentary evidence at all for the next ten years till 1872; when we find Varahalu still estate sheristadar, an office which he held until his death in 1876, and also apparently in possession of Chellakapollam, which was admittedly in possession of his heirs in 1880, when it was taken as security under the hukum. He may never have been deprived of it, or it may have been restored to him. The defendant's case is that for some years after the resumption the revenues of the resumed manyams were not carried into the estate accounts but into the kaniki or private accounts of the Rani, and that in 1872 these revenues were transferred to the estate accounts pursuant to three hukums of the 25th September, 1872 (Exhibits VI, VI-A and VI-B), addressed by the Rani to Varahalu himself as estate sheristadar, to her private sheristadar, and to the Amin R. Venkata Rao. These hukums direct that the manyams resumed from Varahalu should be transferred from the Rani's private accounts to the estate accounts, as their management had not been satisfactory.

The estate accounts for 1862 to 1872 have not been produced, the suggested explanation being that they do not relate to the manyams resumed from Varahalu, which were treated at that

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

Sir John Wallis.

time as forming part of the Rani's kaniki or private estate. This omission has been much relied on for the respondent, and it has also been argued that there was an inam diary which would have thrown light on these matters which was called for, but was not forthcoming.

However, this may be, for 1872 and the following years there is abundant documentary evidence on which Mr. Dunne has strongly relied. It has already been seen that in 1880, when the Rani decided to take over the manyam or manyams which had belonged to the plaintiff's husband, she did so in the hukum already set out, by directing the sheristadar to send for the ryots who cultivated the manyam to the cutcherry and obtain kadapas from them.

Now this is exactly what we find being done after 1872 in respect of Nyallapollam. From the deed of gift of 1858 in the plaintiff's husband's favour it appears that the ryot then cultivating the Nyallapollam manyam which was the subject of the gift was one Rayapureddi Latchanna. It is sufficient to set out the first part of the kadapa executed by this very Rayapureddi Latchanna on the 30th October, 1872 (Exhibit V), in the Rani's favour to show that in 1872 he was again holding under the estate and not under the plaintiff's husband.

"Kadapa executed by Rayapureddi Latchanna, resident of Sankili, a village belonging to the said zamindari —The piece of land that was originally a *manyam* of Ayyagari Varahalu Pantulu Garu, a resident of Sankili, but that was afterwards removed from his possession and kept in your private cultivation under the supervision of Inuganti Seetharamayya Garu, viz., 10 garces of wet land of Sankili village, has been this year taken by me on lease from you for one year, *Angeerasa* (1871-72), Fasli 1281 with the exception of date trees and palm trees existing thereon. The annual *Makta* fixed for the said extent is 6 garces and 27 candies of *Sarva* paddy and cash Rs. 20-2-0."

In the original grant of 1858 (Exhibit D), the land was entered as producing 6 garces and 27 candies of paddy and Rs. 22-11-0 in cash, which was then payable by the cultivator Latchanna. The figures are the same in Exhibit V, except that fourteen years later the cash rent, for some reason or other, had fallen from Rs. 22-11-0 to Rs. 20-2-0. Similar kadapas executed by Latchanna have been exhibited for 1876, Exhibit V^1, 1877, V^2. Then Exhibits V^3 to V^{11} (1886) are kadapas executed by Latchanna, and after him by his son, for much larger areas, which, according to the son's evidence, included Nyallapollam. He states that he paid cist to the Rani and never cultivated under the plaintiff's husband.

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

Sir John Wallis.

These documents clearly show that from 1872 to 1877, and for subsequent years also, if the evidence of the first witness for the defence be accepted, Nyallapollam was in the possession of the Rani and not of the plaintiff's husband.

The Subordinate Judge finds, on the strength of the kadapa (Exhibit V), that Nyallapollam was under resumption in 1872, but ignoring the evidence of Exhibit V^1 and V^2, he finds that in the years immediately following it was again in possession of the plaintiff's husband. This finding is based upon his inferences from the estate accounts which have been put in evidence for 1872 and the following years. Their Lordships have most carefully examined those accounts in view of the findings of the Subordinate Judge and of the arguments addressed to them on this appeal, and find, on the one hand, that they do contain entries showing that the rent or cist payable under these kadapas went into the estate accounts during these years, and, on the other hand, that the entries relied on for the plaintiff do not establish that her husband and his heirs were in possession of Nyallapollam during these years or in 1880, which is the crucial date.

The principal accounts exhibited were the Atukubadi accounts, said to have been prepared by the kurnam of the village (Exhibit VII series), the D.C.B. accounts (Demand, Collection and Balance accounts) (Exhibit VI series), said to have been drawn up in the Tana or divisional office, and the Land Cess account of Sankili village from 1874 (Exhibit XII series). The Zemindar was responsible for the land cess leviable on the revenues of the village under the Local Boards Act, and, when he had alienated any part of these revenues by the grant of inams or manyams, he had to collect the land cess from the alienees.

On examining the accounts we find the rent or cist payable by Rayapureddi Latchanna under his kadapa of 1872 brought into the Demand, Collection and Balance accounts of the estate [Exhibit VI (*c*)], under the heading "Kadapa filed by Rayapureddi Latchanna in respect of Kaniki manyam belonging to Varahalu Pantulu" (the plaintiff's husband), and much reliance has been placed on this description. The manyam had been *kaniki*, that is, in the Rani's private estate, and had previously been Varahalu's, but the entry as a whole shows that this was no longer so, as the rent is brought into the estate account as forming part of that estate, and the description must therefore relate to the previous state of things.

P. C.

Raja of Bobbili v. Ayyagari Sodemma.

Sir John Wallis.

Then as regards land cess, Varahalu is debited in these accounts with Rs. 14-7-6, and it is said that if the grain and money rents shown in the grants of Chellakapollam in 1856 and of Nyallapollam in 1858 be taken, and if the grain rents be converted into money at the appropriate rates, and added to the money rents, and one anna in the rupee be charged on the respective totals, the demand for Nyallapollam works out at Rs. 14-7-6 and the demand for Chellakapollam at three annas less; and that this shows that Varahalu was still in possession of Nyallapollam. Now we know that in the intervening years the money rent of Nyallapollam had fallen from Rs. 22-11-0 to Rs. 20-2-0, and the money rent of Chellakapollam may also have varied in this period. After 1880 we know that under estate management its grain and money rents substantially increased. In these circumstances their Lordships are of opinion that there are no sufficient grounds for holding that this demand related to Nyallapollam.

Further, according to the plaintiff's case, in these years Varahalu had two manyams, Chellakapollam and Nyallapollam, and consequently there ought to be two debits of land cess against him in the accounts. If, therefore, Rs. 14-7-6 does not refer to Chellakapollam, but to Nyallapollam, it could have been shown from the accounts what the land cess of Chellakapollam was, and this has not been done.

Their Lordships consider it unnecessary to pursue this matter further. In their opinion, the plaintiff has failed to prove that her husband was in possession of Nyallapollam after 1863, or that it could have been taken from her as security by the defendant's predecessor in 1880, and there is a considerable body of evidence as to the state of things existing both before and after 1880 which goes to show that it was not so taken.

In these circumstances, their Lordships are of opinion that the appeal should be allowed as regards the Nyallapollam istuva, and the decree of the High Court varied accordingly, and that the respondent should pay the appellant's costs both here and in the lower Appellate Court, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondent: *Chapman Walker* and *Shephard.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SRINIVASA AIYANGAR AND MR. JUSTICE REILLY.

Vankayala Subbarayudu .. *Appellant** (*4th Deft.*)

v.

Kolluri Venkataratnam .. *Respondent* (*Plff.*).

Subbarayudu v. Venkataratnam.

Madras Estates Land Act (I of 1908), S 125—Revenue Court decree for arrears of rent—Transfer of, to Civil Court for execution and sale of ryot's holding by that Court in execution—Sale if free of all encumbrances—"Sold for arrears" in S. 125—Meaning

The sale of a ryot's holding at a Court sale held in a Civil Court in execution of a money decree of a Revenue Court for arrears of rent is not a sale free of all encumbrances as provided in S 125 of the Madras Estates Land Act. The immunity provided in that section arises only when the sale is under Ss. 111 to 124 of that Act.

Second appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in A.S. No. 197 of 1923 (A.S. No. 123 of 1923, District Court, Godavari) preferred against the decree of the Court of the District Munsif of Amalapuram in O.S. No. 60 of 1922.

G. Lakshmanna and *A. Satyanarayana* for appellant.

P. Somasundaram for respondent.

The Court delivered the following

Srinivasa Aiyangar, J.

JUDGMENT.—*Srinivasa Aiyangar, J.*—The only point raised and argued in this Second Appeal is one of some difficulty, but after carefully considering the point and the arguments advanced by the learned gentlemen on both sides I have come to the conclusion ultimately without any hesitation that the appeal should be dismissed.

The 4th defendant is the appellant in this Court. The plaintiff instituted the action from which this appeal has arisen as mortgagee for an ordinary mortgage decree. Defendants 1 to 3 did not defend the suit and allowed the case to proceed *ex parte.* The defence that was set up by the 4th defendant was that Item No. 3 in the plaint, with which alone we are concerned in this Second Appeal, was part of an estate governed by the Estates Land Act and that for the arrears of rent due in respect thereof the landholder had obtained a decree in a Revenue Court, had it transferred to a Civil Court and brought the holding for sale and that he (the 4th defendant) became the purchaser. His contention is that on such sale according to the true construction of the various sections in the Estates

*S. A. No. 978 of 1924. 5th August, 1927.

Subbarayudu v. Venkataratnam. — Srinivasa Aiyangar, J.

Land Act the purchase by him has been free of the encumbrance created by the mortgage in favour of the plaintiff. Both the lower Courts found against the 4th defendant-appellant on this contention and gave a decree to the plaintiff and hence this Second Appeal by him.

Mr. Lakshmanna, the learned vakil for the appellant, has argued strenuously before us that, according to the proper construction of the various sections, to which I shall presently advert, in the Estates Land Act, there could be no difference with regard to the effect between sales held by Revenue Courts and sales held by Civil Courts. The material sections are these. Section 5 is the section which creates a charge in favour of the landholder for the rent payable in respect of the holding. Under section 77, the landholder is authorised for arrears of rent to institute a suit or distrain certain kinds of property, such as moveable property. Section 111 and the following sections under the heading of 'Sales of holding' enable the landholder by following the prescribed procedure to effect a sale of the holding for the arrears of rent. Section 125 prescribes that, when a holding is sold for arrears due in respect thereof, the sale shall be free of all encumbrances, and section 132 extends the provisions of Chapter VI of the Act as far as may be to execution by Revenue Courts. Section 201 in the Act prescribes that a decree or order for payment of money passed by a Revenue Court may be transferred only to a Civil Court for execution. These are the only relevant provisions which have to be considered with reference to the argument advanced.

In this case there is no doubt that the land was part of an estate and therefore governed by the provisions of the Estates Land Act. For the purpose of this argument it may be assumed, because it has not been questioned on either side, that the decree obtained by the landholder in the Revenue Court was in respect of arrears of rent due for the very holding in suit. Some time after this decree was obtained in the Revenue Court, the decree would appear to have been transferred to the District Munsif's Court at Amalapur for execution and it was at the sale held by that Court that Item No. 3 was purchased by the 4th defendant. First, taking into consideration section 125, what it says is that

"When a holding or part of a holding is sold for arrears due in respect thereof, the purchaser shall take, subject to any right or interest which the ryot has created therein with the landholder's permission in writing registered and subject also to any encumbrances created before the passing of this Act."

Subbarayudu v. Venkataratnam.

Srinivasa Aiyangar, J.

It may be observed before proceeding further that this is a somewhat curiously worded section. It does not expressly state that the sale shall be regarded as free of other encumbrances not referred to in the section. However, that appears to be the natural implication in the section and in any case that is the manner in which the section has been construed and no question had been raised before us with regard to that construction. The expression in that section being, "When a holding is sold for arrears due in respect thereof," before the immunity referred to in the section can be claimed or be regarded as attracted, it must be shown that the sale was for arrears due. If that expression had not been used elsewhere in the Act, it may be permissible to regard any sale which come to be effected, whether by a Revenue Court or by a Civil Court, in respect of an obligation which ultimately arose with reference to arrears of rent, as a sale for arrears of rent. But there is in the Act, under the sub-division entitled "Sale of ryots' holding," sections 111, 112 and the following where the landholder is authorised by following the prescribed procedure to bring the holding to sale directly for non-payment of rent due or for arrears of rent in respect of it. Primarily therefore when in section 125 the legislature speaks of sales of holding for arrears of rent, it must be taken that the reference in that section is only to the sale of the ryots' holding as prescribed in the Act in section 111 and the following sections. A sale, albeit in execution of a decree obtained in a Revenue Court, cannot strictly or properly be stated to be a sale for arrears of rent. In legal parlance it would be correctly described as a sale in execution of a decree of a Revenue Court, or if the decree was made by a Civil Court, in execution of such a decree. If on the other hand the legislature had intended that though the sale may be in execution of a decree the same result should follow, namely, that the sale would be regarded as free from certain encumbrances created by the ryot, the legislature would have had no difficulty in making its meaning clear by use of apt language. They had merely to say:

"Any sale for arrears of rent or in execution of decrees obtained for arrears of rent."

But this is not the language employed and therefore when, in section 125, the legislature speaks of sales for arrears of rent and sales of holding at the instance of the landholder for arrears of rent specifically provided for by a direct procedure, the proper construction, it seems to me, would be to hold that the im-

Subbarayudu v. Venkataratnam.

Srinivasa Aiyangar, J.

munity provided in section 125 arises only when the sale is under that sub-division, namely, under sections 111, 112 and so on. Non-payment of the arrears due is the breach of the obligation on which according, to the relative sections the penalty follows, namely, the liability of the holding to be sold. But in the case of execution of a decree, the breach of obligation is not the non-payment of arrears but the non-satisfaction of the decree. Thus it follows that sale for arrears of rent is not the same thing as sale in execution of a decree. Then if in the Act there were no section like section 132 extending the provisions of the chapter to sales by the Revenue Courts, it would follow that, even when the holding is brought to sale in execution of a decree by a Revenue Court the immunity or the freedom from encumbrance provided in section 125 cannot be secured for the purchaser. When, in section 132 we find that the provisions of Chapter VI are, so far as they may be, extended only to execution by Revenue Courts, thereby deliberately excluding execution by Civil Courts, it cannot be a proper consideration to hold that the provision applies to sales by all Courts including Civil Courts. At first I experienced no small difficulty in finding out what possible reason the legislature might have had in excluding any reference to Civil Courts from section 132, what reason the legislature could have had for applying the provisions of Chapter VI only to sales by Revenue Courts. But it must be borne in mind that in section 201 the provision is that, when decrees for money are required to be transferred they can only be transferred to Civil Courts. If it is not a decree for money it follows that the Revenue Court itself might be in a position to carry out execution of the decree of the Revenue Court. When, however, a decree-holder seeks a transfer of the decree to a Civil Court, we must take it that he wants it only because he cannot get the Revenue Court to excuse it in the manner in which he wishes the Civil Court to execute it—it may be in respect of the person of the judgment-debtor who is not within the jurisdiction of the Revenue Court or it may be in respect of the moveable or immoveable property of the judgment-debtor not within the jurisdiction of the Revenue Court. If, however, it was the object of the decree-holder to proceed to recover the amount of the decree by the sale of the very holding, for the non-payment of arrears of rent due in respect of which the decree was obtained, there can be no reason whatever why he should not obtain that relief in the Revenue Court

Subbarayudu v. Venkataratnam.

Srinivasa Aiyangar, J.

itself. It was probably having reference to this that the legislature prescribed that, when decrees for money are sought to be transferred they could only be transferred to Civil Courts. The necessary implication from it would appear to be that, when the decrees are so transferred to Civil Courts they are intended to be executed merely as money decrees. Again, if through the instrumentality of the Revenue Court itself the decree-holder could have obtained the relief, by way of sale of the ryot's holding, there was no reason why he should get the decree transferred to the Civil Court; and whenever he does so it may, therefore, be taken that such transfer was obtained by him merely because the manner in which he wished the decree to be executed was such that the Revenue Court which passed the decree could not grant such execution and such execution could be only granted by the Civil Court. It seems to me, therefore, possible that that was the reason why in section 132 the legislature while extending the provisions of the chapter to sales by Revenue Courts did not extend them to sales by Civil Courts.

The learned vakil for the appellant has drawn our attention to several cases in connection with his argument. *Suramma* v. *Suriyanarayana Jagapathirasu*[1] was referred to and relied upon. That was a case in which the property was sold by a Revenue Court in execution and Phillips and Kumaraswami Sastriar, JJ., held that on such sale the property passed free of all encumbrances according to section 125 of the Act. In *Venkata Lakshmamma* v. *Seetayya,*[2] which was a case somewhat like the present, there was a transfer of a decree passed by a Revenue Court to a Civil Court and the question arose whether on such sale under the provisions of section 125 of the Act the sale was free of encumbrances. The learned Judges, Sadasiva Aiyar and Spencer, JJ., held that, when the sale is by the Civil Court the provision would not apply. In a later case *Kotayya* v. *Kotappa,*[3] Phillips, J., sitting as a single Judge, has held that there is no reason why the legislature should be deemed to have made any difference between the sales by Revenue Courts and by Civil Courts. But that question did not arise for decision in that case because the case before the learned Judge was one for contribution and what was claimed was that on payment by one of the co-sharers of the rent in respect of the land for which

1. (1918) I.L.R. 42 M. 114: 35 M.L.J. 443.
2 (1920) I.L.R 43 M 786 : 39 M.L.J. 30.
3. (1925) 49 M.L.J. 117.

Subbarayudu v. Venkataratnam.

Srinivasa Aiyangar, J.

the landholder had a charge the person making payment obtains by subrogation a similar charge. The decision of that question did not necessarily involve the determination of the question whether or not the sale by a Civil Court should be regarded as free of encumbrances or not. The case of *Venkata Lakshmamma* v. *Seetayya*[2] is direct authority in favour of the respondent in this case. Mr. Lakshmanna for the appellant really argued that the decision of the learned Judges in that case is wrong and tried to persuade us to take a contrary view and if necessary to refer the case to a Full Bench. We are not satisfied that that judgment is wrong. On the other hand, having regard to the various sections to which we have adverted and also what may be supposed to be the intention of the legislature in making the various provisions, it seems to us that the opinion of the learned Judges in that case is right. It is not correct to say, as Phillips, J., seems to have thought in the case in *Kotayya* v. *Kotappa*,[3] that the opinion of the learned Judges was a mere *obiter dictum*. It was really necessary for the purpose of the decision of the case; at any rate Spencer, J., based his decision on no other ground. Mr. Lakshmanna also referred to section 42 of the Civil Procedure Code, but we do not see the bearing that section has on the question before us. If a decree, when transferred to a Civil Court, should, according to the provisions of that section, be executed as if it were a decree passed by itself, then it comes to this, that there is only a decree for money which must be executed like all other decrees for money passed by Civil Courts only by the sale of the right, title and interest of the judgment-debtor at the time of the attachment. It is, therefore, unnecessary to refer to or discuss any of the cases cited with regard to this point.

In the result, I am satisfied that both the lower Courts are correct in the conclusion they arrived at. The second appeal is, therefore, dismissed with costs.

Reilly, J.

Reilly, J.—Defendant 4, who is the appellant before us, bought a ryot's holding at a Court sale held in a District Munsif's Court in execution of a money decree of a Revenue Court for arrears of rent. He contends that his purchase was under section 125 of the Madras Estates Land Act free from encumbrances and in particular free from the mortgage on which the plaintiff sues. Section 125 of that Act provides in effect, though

2. (1920) I.L.R. 43 M 786. 39 M.L.J. 30.
3. (1925) 49 M.L.J. 117.

Subbarayudu v. Venkataratnam.

Reilly, J.

in a rather back-handed way, that, when a ryot's holding is sold for arrears in respect of it, the sale is free from encumbrances with certain specified exceptions. I agree that "sold for arrears" in that section means sold under sections 111 to 124 of the Act. But the provisions of section 125 and the consequent limited freedom from encumbrances have been made applicable by section 132 of the Act to the execution by Revenue Courts of decrees for arrears of rent. In *Suramma* v. *Suriyanarayana Jagapathirasu*[1] it was decided therefore that a sale in a Revenue Court in execution of a decree for arrears of rent made by that Court was free from encumbrances, and in that respect the decision was followed by Sadasiva Aiyar, J., in *Venkata Lakshmamma* v. *Seetayya.*[2] But there is nothing in the Act to make the provisions of section 125 applicable even to that kind of decree when it is executed in a Civil Court and, as was decided in *Venkata Lakshmamma* v. *Seetayya*[2] a sale in execution of a decree so transferred to a District Munsif's Court is not under the provisions of the Act free from encumbrances. I agree, therefore, that defendant 4's appeal must fail. But I may add that I do not in any way dissent from the actual decision of Phillips, J., in *Kotayya* v. *Kotappa*[3] to the effect that the charge for rent given by section 5 of the Act can, in proper circumstances, be enforced by a suit in a Civil Court.

A.S.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE REILLY.

Nagaraja Moopanar .. *Petitioner* (Accused).*

Nagaraja Moopanar, *In re.*

Motor Vehicles Act (VIII of 1914), *S.* 16—*Rules framed under the Act —Rule 27 (c)—Scope of—Accident—Meaning of—Rule if* ultra vires.

The accused was returning one evening from a town in his own motor car with some friends to his home at a village. When he reached a bathing ghat on his way, the car went out of control and jumped over a culvert, the parapet of which was only 9 inches high and fell into a channel. As a result of the accident, the front axle of the car was bent and some chunam was knocked off on the eastern side of the culvert. Those who were in the car received slight injuries but they were able to return to their homes in the

---

*Cr. Rev. Case No. 335 of 1927. 13th October, 1927.
(Cr. Rev. P. No. 295 of 1927).

1. (1918) I.L.R. 42 M. 114. 35 M.L.J. 443.
2. (1920) I.L.R. 43 M. 786: 39 M.L.J. 30.
3. (1925) 49 M.L.J. 117.

Nagaraja Moopanar, In re.

same car. For the next two days the accused stayed at home, presumably to get over the shock of the accident. On the morning of the next day, the Sub-Inspector of Police hearing of the accident called at the accused's house and recorded a statement from him. The accused was charged under S. 16 of the Motor Vehicles Act for having failed to comply with R. 27 (*c*) of the Motor Vehicles Rules framed under the Act and convicted by the Trial Magistrate. The same was confirmed by the Joint Magistrate on appeal. The accused preferred a Revision Petition to the High Court.

Held, that R. 27 (*c*) of the Motor Vehicles Rules is intended to apply only to accidents happening to the car which one is driving and which results in some injury, annoyance or danger to the public or of danger or injury to public property or obstruction to traffic, and that the accident in the present case did not fall within its scope, as there was no evidence that by this accident any one was really injured or annoyed or that it obstructed traffic or destroyed property

R. 27 (*c*) of the Motor Vehicles Rules would be *ultra vires* if it included within its scope all accidents such as the bursting of a tube or the puncture of a tyre of a motor car.

Meaning of the word "accident" in R. 27 (*c*) of the Motor Vehicles Rules discussed.

Unsatisfactory wording and vagueness of R. 27 (*c*) of the Motor Vehicles Rules and the necessity for amendment of the Rule pointed out.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Kumbakonam in Cr. Appeal No. 49 of 1926 preferred against the judgment of the Court of the Stationary 2nd Class Magistrate of Papanasam in C.C. No. 240 of 1926.

B. C. Sankaranarayana for petitioner.

K. N. Ganapathi for *Public Prosecutor* for the Crown.

The Court made the following

Madhavan Nair, J.

ORDER. *Madhavan Nair, J.*—This Criminal Revision Petition is to revise the judgment of the Joint Magistrate of Kumbakonam in Cr. Appeal No. 49 of 1926 by which he confirmed the conviction of the petitioner, the owner and driver of a motor car, under section 16 of the Motor Vehicles Act, 1914, for failing to comply with Rule 27 (*c*) of the Motor Vehicles Rules framed under the Act.

The rule in question runs as follows:

"The driver of a motor vehicle shall promptly report all occurrences of accidents to the nearest police station."

The facts are briefly these. On the evening of the 3rd of June, 1926, the petitioner was returning from Kumbakonam in his own car with some friends to his home at Kapisthalam. When he reached Ramanujapuram bathing ghat on his way, the car went out of control and jumped over a culvert, the parapet of

Nagaraja Moopanar, *In re.*

Madhavan Nair, J.

which was only 9 inches high, and fell into a channel. As a result of the accident, the front axle of the car was bent and some chunam was knocked off on the eastern side of the culvert. Those who were in the car received slight injuries; but they were able to return to their homes in the same car. For the next two days the petitioner stayed at home, presumably to get over the shock of the accident. On the morning of the 6th of June the Sub-Inspector of Police hearing of the accident called at the petitioner's house and recorded a statement from him.

In support of the revision petition three arguments have been advanced before us: (1) that the rule in question is *ultra vires* and that the Local Government has no power under the Act to frame such a rule; (2) that the lower Court erred in holding that there was an accident within the meaning of the rule in this case; and (3) that if there was an accident within the meaning of the rule, the facts show that the petitioner sufficiently complied with the requirement of the rule. I will deal with these arguments in order.

Points 1 *and* 2.—As the question whether the rule is *ultra vires* or not depends on the decision whether the rule having regard to its true scope and meaning falls strictly within the provision authorising the Government to make the rule, the two points may be considered together. Under section 11, cl. (1) of the Act, the Local Government has power to make rules for the purpose of carrying into effect the provisions of the Motor Vehicles Act and of regulating the use of motor vehicles in public places. Under cl. (2), sub-clause (1) the Local Government may make rules providing generally for the prevention of danger, injury or annoyance to the public or any person, or of danger or injury to property, or of obstruction to traffic. Rule 27 (*c*) appears to have been made under this provision. The wording of the rule is vague and its scope is uncertain. The word 'accident' is not defined in the Motor Vehicles Act or in any of the rules framed thereunder. Ordinarily it means an event which takes place without one's foresight or expectation. The falling of the motor car into the channel is certainly an event which comes within the meaning of the term 'accident' as understood in its ordinary sense. The bursting of a tube or the puncture of a tyre of a motor car while being driven on the road is as much an 'accident' as its falling into a channel. Are these accidents to be promptly reported to the nearest police station and, if so, for what purpose? Again, the rule as it stands makes it obli-

Nagaraja Moopanar, *In re.*

Madhavan Nair, J.

gatory on any one driving a motor car to report to the nearest police station all kinds of accidents that he may see happening on the road such as, accidents to other cars, accidents to pedestrians walking on the road and other accidents of similar description, in which one's own car is not in any way involved. But was this ever the intention of the Government when it passed the rule? I think not. If the rule included within its scope all the accidents above referred to, it would certainly be *ultra vires* under the Act. But obviously the rule is intended to apply only to accidents happening to the car which one is driving and which results in some injury, annoyance or danger to the public or of danger or injury to public property or obstruction to traffic as may be gathered from the object of the rules as specified under sub-clause (i), of clause (2) of section 11. If the rule is so understood, then it is clear that the Government have power to frame it under section 11, cl. (2), sub-clause (i) and that the 'accident' in the present case does not come within its scope. It may here be mentioned that there is no evidence that by this accident any one was really injured or annoyed or that it obstructed traffic or destroyed property. I have no doubt that it is the unsatisfactory wording of the rule and its vagueness that has been the cause of this prosecution, which is clearly a frivolous one. If the rule is not made more precise it is bound to give trouble to the authorities who have to administer it.

As I have held that the incident we are dealing with in this case is not an accident within the meaning of the rule, it is not necessary to consider the third point raised, namely, that

"If there was an accident within the meaning of the rule, the facts show that the petitioner sufficiently complied with the requirement of the rule"

I would, therefore, set aside the conviction. The fine, if paid, will be refunded.

Reilly, J.

Reilly, J.—The rule in question, Rule 27 (*c*) of the Madras Motor Vehicles Rules, that

"the driver of a motor vehicle shall promptly report all occurrences of accidents to the nearest police station"

is extraordinarily vague. We are informed that this rule among others has been made by the Local Government under the Indian Motor Vehicles Act, 1914, though oddly enough there is no mention of that in the Madras Motor Vehicles Rules as officially published. We may presume, though that is not stated, that it is not intended by this rule to lay a duty on the driver of a motor

Nagaraja Moopanar, *In re.*

Reilly, J.

vehicle to report any accidents but those which he himself observes in the happening or as having happened. But is he to report any accident which comes to his notice, the fall of a tree by the roadside or a rider being thrown from his horse? It is probable that those who made this rule, though they used such wide language, intended it to apply only to accidents in some way connected with motor vehicles. But, even if we narrow the meaning of the language so far, is the driver of a motor vehicle bound to report every accident connected with any other motor vehicle which comes to his notice? The rule, even when read solely with reference to the subject of the Act, covers in its plain meaning all such accidents. But an accident to a motor vehicle might well come to the notice of the drivers of 100 other motor vehicles in succession. Is each of them bound to report the accident to the nearest police station? The rule appears to say so; but that can hardly be its intention. Then must we confine the rule to accidents to the vehicle which the driver is himself driving or in which his vehicle is in some way concerned? That appears to be a reasonable restriction of the rule, though not to be found in the rule itself. But even then, does the rule apply to any accident to the vehicle which the driver is driving, even though no other vehicle or person or thing outside the vehicle which he is driving is affected by it? If a tyre of the vehicle is punctured on the road or a speck of paint is scraped off a mudguard in coming out of a garage, is that accident to be reported? That can hardly be intended. If this rule has been made under the Indian Motor Vehicles Act, it must have been made under section 11 of the Act. Under sub-section (2) (i) of that section rules can be made

"providing generally for the prevention of danger, injury or annoyance to the public or any person or of danger or injury to property or of obstruction to traffic"

It has been contended by Mr. Ganapathi for the Public Prosecutor that the rule in question has been made under sub-section (2) (i). If so, we may properly give this rule a meaning which falls within that clause, so far as that is possible, and reject as ineffective, any meaning, however verbally legitimate, which goes beyond that clause. No reporting by the driver of a puncture or of an injury to the paint of his car can prevent danger, injury or annoyance to any one or injury to property or obstruction to traffic. We can exclude, therefore, such happenings from "accidents" within the proper meaning of the rule. But I am not satisfied that, as contended for the peti-

tioner, we can exclude from its proper purview all accidents which do not affect immediately some vehicle, person or thing outside the vehicle which the driver is driving. An accident which makes the control of that vehicle impossible in the usual way or more difficult than usual may be a source of danger to other users of the road, and a rule requiring the driver to report such an accident would be within the rule-making power under the Act.

It appears to me very unfortunate and unfair both to the public and to those who have to administer the law that this rule should have been so vaguely worded. But let us see whether the evidence shows that anything happened in this case which the petitioner was bound to report under the rule interpreted in the restricted sense in which alone the Act gives power to make it. According to the evidence, while the petitioner was driving his car one evening along a road, it went over the parapet, which was only 9 inches high, of a culvert and fell into a channel; the front axle of the car was bent, and the petitioner and other persons in the car were slightly hurt. How much the axle was bent is not disclosed, and there is nothing to show that the car was rendered unserviceable or that the petitioner did not drive it home without difficulty the same evening. Nor is there any evidence to show what injuries were received by the petitioner or the other persons in the car. Ex. I, the petitioner's statement to the Police during their investigation, is inadmissible, and without it there is no evidence of the circumstances in which the car left the road. The Sub-Magistrate states in his judgment that the car dropped 6 feet into the channel; but there appears to be no evidence of that. Of damage to anything outside the car there is evidence only that a little chunam was knocked off the parapet wall. Now would the reporting of such an occurrence tend to prevent danger, injury or obstruction to any person or thing? Conceivably it might do so if there was any evidence to show that the accident was due to any rash or incompetent driving or to any defect in the car, which might lead to the cancellation or suspension of the driver's license or the cancelling of the registration of the car. But, though the Police have investigated this case, there is no suggestion that they found anything which would justify any such step. In this case, therefore, it does not appear that the reporting of the accident would have served any of the purposes mentioned in section 11 (2) (i) of the Act.

Nagaraja Moopanar, *In re.*

Reilly, J.

As I understand this case, an accident did happen to the petitioner's car, and, if Rule 27 (*c*) could properly be interpreted to the full extent of its literal meaning, the petitioner contravened it by failing to report the accident. But, as I have shown, to interpret the rule according to its literal meaning takes us far beyond the rule-making power given by the Act and indeed leads to absurdities. We must, therefore, give an artificially restricted meaning to the words used in the rule and be sure that the facts of the case fall within the rule so far as it does not exceed the rule-making powers given by the Act. In my opinion it has not been proved that what happened was an accident which a driver can be required to report by a rule made within the powers given by the Act, though it does not appear to me improbable that, if complete evidence had been given as to exactly what happened and the extent of the damage done to the car, it might have been shown that an accident occurred which the petitioner was bound to report within the valid scope of the rule. I agree that the petitioner's conviction must be set aside and he must be acquitted and the fine, if paid, be refunded to him. But I may perhaps be allowed to express a hope that the rule will be amended so as to make it clear in expression and clearly within the rule-making powers given by the Act.

N.S. *Conviction set aside and fine ordered to be refunded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE DEVADOSS.

Ramachandra Dikshidar and others .. *Appellants**
(Defts. 5 to 8)

v.

Narayanaswami Reddiar .. *Respondent (Plff.).*

Ramachandra Dikshidar v. Narayanaswami Reddiar.

Transfer of Property Act, S 95—Mortgaged property—Purchaser of portion of—Assignment of prior mortgages on the property obtained by—Suit to enforce those mortgages by purchaser—Assignee—Maintainability—Right of such purchaser—Assignee—Contribution—Suit for.

A third mortgagee of two items of property obtained a decree on foot of his mortgage and purchased one of the items in execution of that decree. Subsequently he obtained a transfer of the first two mortgages, and instituted a suit to enforce those mortgages.

Held, that the suit was not maintainable, and that the plaintiff's only remedy was under S. 95 of the Transfer of Property Act for contribution.

---

*A.S. No. 150 of 1924. 27th February, 1928.

Rama-chandra Dikshidar v. Narayana-swami Reddiar.

The purchaser of a portion of the mortgaged property is a mortgagor within the meaning of S. 95.

Appeal against the decree of the Court of the Subordinate Judge of Chingleput in O.S. No. 1 of 1922.

A. Krishnaswami Aiyar, M. Subbaroya Aiyar and *K. Balasubramania Aiyar* for appellants.

K. S. Krishnaswami Aiyangar for respondent.

The Court delivered the following

Phillips, J.

JUDGMENT. *Phillips, J.*—One Pillayar Dikshitar and defendants 1 to 4, his sons, executed a mortgage deed for Rs. 7,000 in favour of one Venkatasubbier on 15th April, 1909. Again on 24th May, 1911, the said Pillayar Dikshitar and the 2nd defendant executed a mortgage for Rs. 1,500 in favour of the same person. Lands of two villages were mortgaged under these documents, *i.e.*, Parameswaramangalam and Koothavakkam. There was a third mortgage on 6th August, 1912, in favour of the plaintiff's brother, Raghava Reddi. He filed a suit on his mortgage, obtained a decree and purchased Koothavakkam village. He is now dead and the plaintiff is the owner of the equity of redemption of Koothavakkam village. On 6th December, 1920, the plaintiff obtained a transfer of the first two mortgages and has now brought a suit to enforce them. In the deed of assignment the amount due on the two mortgages is said to have been Rs. 18,718, but the price paid by the plaintiff for the assignment was only Rs. 6,000. The Subordinate Judge has given the plaintiff a decree against defendants 1 to 8 for half of the suit amount against Parameswaramangalam village, holding that the property in plaintiff's possession was equal in value to the remainder of the mortgage property. A number of defendants were impleaded in the suit as having an interest in the mortgage properties. The decree was passed only against defendants 1 to 8, members of the mortgagor's family, and now defendants 5 to 8 alone appeal.

The appellants' contention is that the plaintiff's only remedy is under section 95 of the Transfer of Property Act for contribution, he having redeemed the mortgage and being one of the mortgagors. It has been held by the Privy Council in *Ahmad Wali Khan* v. *Shamsh-ul-Jahan Begam*[1] that section 95 is not applicable to usufructuary mortgages alone, but is also applicable to simple mortgages. Under section 101 of the Transfer of Pro-

1. (1906) I.L.R. 28 A. 482: 33 I.A. 81: 16 M.L.J. 269 (P.C.).

Ramachandra Dikshidar v. Narayanaswami Reddiar.

Phillips, J.

perty Act where the owner of a charge or other incumbrance on immoveable property is or becomes absolutely entitled to that property the charge or incumbrance shall be extinguished. When, therefore, the plaintiff as the owner of Koothavakkam village paid off all the encumbrances, those mortgages became extinguished, unless it is a necessary implication that they should subsist for the plaintiff's benefit. His contention that he can bring a suit upon these mortgages is *prima facie* untenable, for under Order 34 of the Civil Procedure Code he would be bound to implead himself as a defendant, as being a person interested in the mortgage property as owner thereof. Such a position would be absurd and consequently the legislature has enacted section 95 of the Transfer of Property Act which gives to one of several mortgagors who redeems the mortgage property a charge on the share of each of the other co-mortgagors. It is contended for the respondent that the application of section 95 of the Transfer of Property Act must be restricted to mortgagors in the sense of persons who have actually executed the mortgage deed and does not include their heirs or assigns. No authority is cited for such a proposition, whereas there is authority against it in *Vithal Nilkanth Pinjale* v. *Vishwasrav*[2] and *Nainappa Chetti* v. *Chidambaram Chetti*.[3] The plaintiff, therefore, as the purchaser of a portion of the mortgage property must be deemed to be one of the mortgagors.

It is further argued that section 95 does not preclude the mortgagor from suing on his mortgage, but as I have pointed out *prima facie* such a suit would be impossible and the only authority that can be suggested as being in favour of it is the decision of the Privy Council in *Ayyareddi* v. *Gopalakrishnayya*.[4] In that case the circumstances were somewhat peculiar and payments made to the second mortgagee, which were made after he had obtained a decree, were held not to be payments in discharge but payments in respect of the purchase of the mortgage right. In that case also the payment had been made by the defendants, who were allowed to put forward the rights under the mortgage as a shield against other encumbrancers. The right of a defendant to use a prior mortgage which he has discharged as a shield against puisne encumbrancers is well recognised and in the present case the plaintiff could use his charge under the two mort-

2. (1884) I.L.R. 8 B. 497.
3. (1897) I.L.R. 21 M. 18 at 26.
4. (1923) I.L.R. 47 M. 190: 51 I.A. 140: 46 M.L.J. 164 (P.C.).

Rama-chandra Dikshidar v. Narayana-swami Reddiar.

Phillips, J.

gages as a shield against puisne encumbrancers provided that there was no personal liability on his part to pay the subsequent encumbrancers. This is not an authority for holding that a suit can be brought upon the mortgages against the co-mortgagors. There are some remarks in the judgment of Ramesam, J., in *Sundarammal* v. *Sundara Reddi*,[5] which seem to support the appellant's proposition, but they are *obiter dicta* and the circumstances of that case were somewhat exceptional. If the learned Judge intended to hold that a mortgagor who had redeemed a mortgage is entitled to sue his co-mortgagor on the same, with all respect I must differ; and I am supported by the decision of this Court in *Iyathurai Aiyar* v. *Kuppumuthu Padayachi*.[6] The argument that the plaintiff obtained a good bargain for himself by getting an assignment of the mortgages for one-third their value and should not be deprived of the benefit of his bargain cannot affect the question of law. It is questionable whether in the present suit the plaintiff should be allowed to obtain a decree for contribution, but as this is not seriously disputed the suit may be treated as one for contribution under section 95 of the Transfer of Property Act. As regards the amount of contribution to which he is entitled the Subordinate Judge has treated the properties of which the plaintiff is the owner and the properties of which defendants 1 to 8 are the owners as equal in value relying on a sale-deed for the former (Ex. 39). He has, however, omitted to notice that that sale-deed is only of seven-tenths of the Koothavakkam lands which were to be sold for Rs. 10,500. This would make the total value of the lands Rs. 15,000. The description of the lands in Ex. 39 is such that they are clearly the lands mortgaged. It has been found and is not now disputed that Parameswaramangalam lands are worth only Rs. 12,000. The plaintiff is, therefore, entitled to recover from the appellants four-ninths of the Rs. 6,000 paid by him for redemption, namely Rs. 2,666-10-8. He also claims interest on the amount paid. In the circumstances I think interest at 6 per cent. on the sum of Rs. 2,666-10-8 may be allowed from the date of assignment till the date of suit.

So far as defendants 5 to 8 are concerned the lower Court's decree will be modified by giving a charge for the above amount alone on the Parameswaramangalam properties in their possession with 6 per cent. interest up to the date of payment. Time 6 months.

5. (1927) 38 M.L.T. 148. 6. (1918) 9 L.W. 120.

Ramachandra Dikshidar v. Narayanaswami Reddiar.

The plaintiff will pay the costs of this appeal, and in the lower Court plaintiff and defendants 5 to 8 will pay and receive proportionate costs. As between defendants 1 to 8, defendants 5 to 8 are liable only for one-fifth of Rs. 2,666-10-8.

Devadoss, J.—I agree and have nothing to add.

A.S.V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN AND MR. JUSTICE ANANTHAKRISHNA AIYAR.

Srinivasam Pillai .. *Appellant* in A.A.O. and Petr. in C.R.P. (Respdt.)*

v.

Rukmani Ammal .. *Respondent in both (Petitioner).*

Srinivasam Pilla v. Rukmani Ammal.

Civil Procedure Code (V of 1908), O 41, R 10, S. 107 (2)—Security for costs—Failure of appellant to furnish, within time allowed—Dismissal of appeal on ground of—Restoration—Power of Court.

An Appellate Court has power, under S. 107 (2) of Civil Procedure Code, to restore an appeal dismissed on the ground of the failure of the appellant to furnish security for costs within the time fixed by the Court.

Appeal against the order of the Court of Small Causes, Trichinopoly, dated 15th September, 1926 in I.A. No. 970 of 1926 in A.S. No. 142 of 1925 and Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Small Causes, Trichinopoly, dated 15th September, 1926 in I.A. No. 969 of 1926 in A.S. No. 142 of 1925.

T. V. Muthukrishna Aiyar for appellant.

S. Ramaswami Aiyar for respondent.

The Court delivered the following

Curgenven, J.

JUDGMENTS. *Curgenven, J.*—The plaintiff (now respondent) sued on a promissory note and in the appeal from the dismissal of her suit the defendant applied for and obtained an order directing her to furnish security for costs. The property which was tendered for this purpose was found insufficient and the Court gave her further time to supply the deficiency up to 13th February, 1926. This was not done and on that date neither she nor her pleader was present. The Subordinate Judge, therefore, passed an order

---

*C.M.A. No. 62 of 1927 and C.R.P. No. 211 of 1927. 13th September, 1927.

Srinivasam Pillai v. Rukmani Ammal.

Curgenven, J.

"Appellant and her vakil are absent, security not given. The appeal stands dismissed with costs"

That order was actually passed on the application (I.A. No. 2202 of 1925) for security filed by the defendant, but it of course involved also the dismissal of the appeal. On 16th March, 1926, the plaintiff applied for a review of the order passed on I.A. No. 2202 and the learned Subordinate Judge granted it, at the same time restoring the appeal and allowing another petition by the plaintiff for further time within which to furnish security. We have now before us a Civil Revision Petition against the order in I.A. No. 969 of 1926, which was the order restoring the appeal, and a Civil Miscellaneous Appeal against the order in I.A. No. 970, which was, if we look to its terms, an order reviewing the order passed in I.A. No. 2202.

It is clear that the primary question which we have to decide is whether the Subordinate Judge was competent to restore the appeal; because until it was restored no further action upon the security petitions could have been taken. Security is demanded from an appellant under Order 41, Rule 10 and sub-rule (2) of that rule requires that if there is default in furnishing security the Court shall reject the appeal. Having rejected it, is the Court competent to restore it if sufficient cause for the failure to furnish security within the time allowed is shown? It has been suggested that this power may be derived in two ways: (*a*) by reviewing the order of rejection under Order 47, Rule 1 and (*b*) by applying the corresponding provision contained in Order 25, Rule 2 for the restoration of a suit by force of section 107 (2) of the Code. As regards the power to review it has been held by this Court in *Vemareddi Ramaraghava Reddi* v. *Rajah of Venkatagiri*[1] that the words "other sufficient cause" in Rule 1 of Order 47 would not include such a ground as an explanation of default of appearance and this is in accordance with the judgment of the Privy Council in *Chhajju Ram* v. *Neki*,[2] which lays down that these words must mean something *ejusdem generis* with what precedes them. Even the learned Judges who decided *Sundar* v. *Habib Chik*,[3] which it may be noted was prior to the Privy Council judgment, leave the question open whether in such circumstances the order could be reviewed. It is unnecessary further to discuss this point as I have come to the conclusion, though not without some hesitation, that the

1. (1926) 52 M.L.J. 123.
2. (1922) I.L.R. 3 Lah. 127: 49 I.A. 144: 43 M.L.J. 332 (P.C.).
3. (1920) I.L.R. 42 All. 626.

Srinivasam Pillai v. Rukmani Ammal.

Curgenven, J.

order restoring the appeal may be justified upon the second ground. At first sight I was inclined to accept the appellant's argument that since there is no provision in Order 41, Rule 10 corresponding to that in Order 25, Rule 2 (2), enabling a suit to be restored, it must be concluded that the intention was not to confer a power of this kind upon an Appellate Court. Where a power might have been, but has not been expressly conferred, it must be deemed, it is said, to have been withheld. If all the provisions relating to appellate procedure were self-contained, this argument, I think, might be conclusive. But that is not so. Section 107 of the Code invests an Appellate Court with the same powers and duties as are conferred and imposed upon a Court of Original Jurisdiction subject to such conditions and limitations as may be prescribed by rules under the Code. Subject, therefore, to anything which the rules may have to say, it follows that since a Trial Court may restore a suit dismissed for failure to furnish security, so also may an Appellate Court restore an appeal rejected for the same reason. We have thus to consider whether the rules deprive an Appellate Court of a power which, but for them it would possess under the Code. This aspect of the matter does not seem to have been brought to the attention of the learned Judges who decided *Sankaralinga Chetti* v. *Annamalai Chetti*.[4] It was suggested by my learned brother during the course of the argument, and to him also is due an elucidation, which I think may be accepted, of the existence of an express provision in the rules for the taking of security in appeals, while no such provision occurs empowering restoration of an appeal rejected for failure to furnish it. It is a sufficient reason for the presence of sub-rule (1) of Rule 10 of Order 41 that the circumstances in which security may be taken in an appeal differ widely from those in which it may be taken in a suit. The desired object could not, therefore, have been achieved by leaving section 107 to operate upon Order 25, Rule 2 (1). But it may be so left to operate, so far as sub-rules (2) and (3) of that rule are concerned, because the terms of those sub-rules are appropriate to the case of appeals. Nor does any reason occur to me on principle, why an Appellate Court should not possess this power of restoration. The circumstances of the present case appear to me to afford an illustration of the necessity for it.

I have only to add that, even if the view we take be erroneous, the case is not such as would justify us in exercising our

4. (1908) 19 M.L.J. 304.

Srinivasam Pillai v. Rukmani Ammal.

Anantha-krishna Aiyar, J

discretion to revise under section 115, Civil Procedure Code. The Civil Revision Petition and Civil Miscellaneous Appeal are accordingly dismissed, subject to the order which my learned brother is going to propose in the matter of costs.

Ananthakrishna Aiyar, J.—The plaintiff (Rukmani Ammal) instituted the original suit to recover money due under a promissory note. The District Munsif having dismissed the suit on the merits, she preferred Appeal No. 142 of 1925 on the file of the Subordinate Judge. While the appeal was pending, the defendant-respondent applied to the Lower Appellate Court for an order directing the appellant to furnish security for the costs decreed to him in the first Court and for the probable costs of the appeal. The security that was first tendered was found to be insufficient and she was ordered to furnish further security by the 13th of February, 1926. On that date the application was called at 11-15 A.M., but the appellant and her vakil being absent, the learned Subordinate Judge passed the following order:—

"Appellant and her vakil are absent—security not given—the appeal stands dismissed with costs."

It was mentioned to us that the appeal was posted for hearing for the 23rd February, 1926, but as security was not given, the appeal was dismissed with costs on the 13th February, 1926. On the 16th March, 1926 (the 14th and 15th of March being public holidays) Rukmani Ammal filed three applications before the Lower Appellate Court (I.A. Nos. 969, 970 and 971 of 1926) praying in effect, in one of the petitions, to set aside the order passed on default of her appearance and to rehear; in the other, to review under Order 47, Rule 1; and in the third to extend the time for completing the security that she had to furnish in accordance with the order of Court. In paras. 5 and 6 of the affidavit filed by her in support of the application, she stated as follows:—

"When the petition was called on 13th February, 1926, my vakil was not present as he was engaged in the District Court in connection with another case Being a female, I too did not attend Court that day Thereupon an *ex parte* order was passed on the petition that as security was not furnished the appeal was dismissed I have now furnished fresh security"

She also alleged in her affidavit the reasons for her not having furnished security in time and why she wanted a further extension of time. The learned Subordinate Judge accepted her explanation, set aside his previous orders, dated 13th February, 1926, restored the appeal and extended time for

Srinivasam Pillai v. Rukmani Ammal. — Anantha-krishna Aiyar, J.

furnishing security and directed the security tendered by her to be tested. In the course of his order he stated as follows:—

"I think I can accept the explanation and condone the default. I set aside my order and give the appellant time to furnish security. This entails the restoration of the appeal."

The defendant-respondent before the Lower Appellate Court has preferred to the High Court C.M.A. No. 211 of 1927 against the order in I.A. No. 970 passed on review under Order 47, Rule 1, and he has preferred C.R.P. No. 211 of 1927 against orders passed in I.A. No. 969 setting aside orders passed on default of appearance and extending time for furnishing security.

Mr. T. V. Muthukrishna Aiyar, the learned vakil who has appeared for the appellant before us argued that Order 47, Rule 1 did not apply to the present case having regard to the recent decision of the Privy Council reported in *Chhajju Ram* v. *Neki*[2] explaining the meaning to be attached to the words "other sufficient reason" occurring in Order 47, Rule 1. He also relied on the decision reported in *Vemareddi Ramaraghava Reddi* v. *Rajah of Venkatagiri*,[1] where it was held that default of appearance was not the reason contemplated by Order 47, Rule 1 of the Civil Procedure Code, nor was it analogous to any such reason. He also laid stress on Order 41, Rule 10, clause (2), which enacts

"Where such security is not furnished within such time as the Court orders, the Court shall reject the appeal."

The learned vakil urged that the Subordinate Judge had no jurisdiction to interfere with the order once passed by him rejecting the appeal. The decision in *Sankaralinga Chetti* v. *Annamalai Chetti*,[4] *Firozi Begam* v. *Abdul Latif Khan*[5] and *Hari Bhabini Debi* v. *Narendra Nath Roy*[6] were quoted in support of the appellant's contentions.

On behalf of the respondent Mr. S. Ramaswami Aiyar raised a preliminary objection to the effect that an appeal C.M.A. No. 62 of 1927 does not lie in this case since the ground on which the Subordinate Judge granted the application for review was not among the grounds mentioned in Order 47, R. 7 conferring a right of appeal to the aggrieved party from an order grant-

1. (1926) 52 M.L.J. 123

2 (1922) I.L.R. 3 Lah 127: 49 I.A. 144· 43 M.L.J. 332 (P.C.).

4. (1908) 19 M.L.J. 304.

5. (1908) I.L.R. 30 All 143.

6. (1922) 67 I.C. 883.

Srinivasam Pillai v. Rukmani Ammal.

Anantha-krishna Aiyar, J.

ing a review application. He relied on the decisions of the Allahabad High Court reported in *Sundar* v. *Habib Chik*[3] and of the Calcutta High Court in *Goljan Bibi* v. *Nafar Ali*.[7] The learned vakil also urged that orders having been passed on the default of appearance of the plaintiff and her pleader on 13th February, 1926, the Court had jurisdiction to set aside the orders passed on 13th February, 1926, on being satisfied that there was sufficient cause for the said non-appearance. He also relied on Order 25, R. 2, sub-clause (2) of the Civil Procedure Code read along with section 107 (*ii*).

After having given the case my best consideration I have come to the conclusion that we should not interfere with the orders passed by the Subordinate Judge on I.A. Nos. 969, 970 and 971 by which he set aside his prior order of 13th February, 1926, with the result that the appeal was restored to file and further time was allowed for completing the security.

Having regard to the decision of the Privy Council reported in *Chhajju Ram* v. *Neki*[2] the words "any other sufficient reason" occurring in Order 47, Rule 1 have to be interpreted as meaning any reason sufficient on grounds at least analogous to those specified immediately previously in the said rule. The decision in *Vemareddi Ramaraghava Reddi* v. *Rajah of Venkatagiri*[1] is to the effect that default of appearance is not a reason contemplated by Order 47, Rule 1, nor is it analogous to any such reason. It would, therefore, seem to follow that the Lower Appellate Court was not right in invoking its jurisdiction under Order 47, Rule 1 (*review*). The ruling in *Sundar* v. *Habib Chik*[3] was before the decision of the Privy Council in *Chhajju Ram* v. *Neki*.[2] In *Goljan Bibi* v. *Nafar Ali*[7] it is only stated

"that it was not disputed that the Judge had jurisdiction to re-admit the appeal after having dismissed it by an order under cl (2), R. 10 O. 41."

The provision of law under which the Judge had such jurisdiction is not mentioned. *Hari Bhabini Debi* v. *Narendra Nath Roy*[6] does not discuss the question though the Court held that there was no jurisdiction to extend time for furnishing security after the appeal had been dismissed. The decision in *Sankaralinga Chetti* v. *Annamalai Chetti*[4] while holding that the deci-

1 (1926) 52 M.L.J. 123.
2 (1922) I.L.R. 3 Lah 127: 49 I.A 144: 43 M.L.J. 332 (P.C.).
3. (1920) I.L.R. 42 All. 626
4. (1908) 19 M.L.J. 304.
6. (1922) 67 I.C. 883.
7. (1917) 28 Cal. L.J. 163.

Srinivasam Pillai v. Rukmani Ammal.

Anantha-krishna Aiyar, J.

sion of the Privy Council in *Balwant Singh* v. *Daulat Singh*[8] "was arrived at on a particular state of facts and is not in our opinion an authority for the position that an appeal duly rejected under S 549 of the Civil Procedure Code can be restored by the Court which rejected it" proceeded to state as follows:—

"that as pointed out in *Firozi Begum* v. *Abdul Latif Khan*[5] there is no provision in S. 549, Civil Procedure Code, similar to that contained in S. 381 and permitting an appellant whose appeal has been rejected under S. 549 to apply for an order setting the dismissal aside, nor have we been referred to any provision elsewhere in the Code under which such an application will lie."

We may in this connection refer to the decision of Mukerji and Buckland, JJ., in *Ramesh Chandra Das* v. *Sarada Kripa Lala*[9] to the effect that an order rejecting an appeal under O. 41, Rule 10, Civil Procedure Code, for failure to furnish security for costs is not appealable either as a decree or as an order. It would, therefore, seem to follow if the contentions urged on the appellant's side and the decisions mentioned above be accepted that a party, whose appeal has been rejected on the ground that security for costs was not furnished within such time as the Court ordered, has no further remedies open to him. It was suggested that the matter was one for the legislature and that the Courts had no power to grant any relief, whatever sufficient reason the party might have for not having furnished the security within the time allowed.

In the present case, it is true, there was this additional circumstance, *viz.*, there was also default of appearance on the part of the appellant and her pleader so that the Court could set aside the prior orders on being satisfied that the party had sufficient cause for not appearing on the due date. But I should like to consider whether there is any general provision of law by which the Court could grant relief in cases where orders had been passed by it under Order 41, Rule 10. In the case of suits (not appeals) there is the specific provision made in Order 25, Rule 2, sub-clause (2) which runs as follows:—

"Where a suit is dismissed under this rule, the plaintiffs may apply for an order to set the dismissal aside, and if it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from furnishing the security within the time allowed, the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

5. (1908) I.L.R. 30 All. 143.
8. (1886) I.L.R. 8 All. 315: 13 I.A. 57 (P.C).
9. (1921) I.L.R. 49 C. 355.

Srinivasam Pillai v. Rukmani Ammal.

Anantha-krishna Aiyar, J.

Such a provision does not find a specific place in O. 41. It is, therefore, argued on behalf of the appellant that Rule 10 of O. 41 is exhaustive of the powers of the Appellate Court in matters relating to security for costs in an appeal, and that as the Legislature has enacted Rule 10 of O. 41 without incorporating in it any provision analogous to O. 25, R. 2, sub-clause (2) therefore the Court is not entitled to travel outside the provisions of O. 41, R. 10; and that the result is inevitable where such security is not furnished by the appellant within such time as the Court orders, the Court shall reject the appeal and that the appellant has no further remedy open in such cases.

It seems to me, however, that under S. 107, clause (2), Civil Procedure Code, the Appellate Court has the same powers and is to perform as nearly as may be the same duties as are conferred and imposed by the Code of Civil Procedure on Courts of Original Jurisdiction in respect of suits instituted therein. I think that this provision confers on the Appellate Court similar powers in respect of appeals rejected on the ground that security had not been furnished within the time allowed as are conferred on the Original Court by O. 25, R. 2, sub-clause (2) when a suit is dismissed on the ground of failure by the plaintiff to furnish security within the time fixed by the Court. I am of opinion that the Appellate Court has got the power to set aside the dismissal of an appeal upon such terms as to security, costs or otherwise as it thinks fit, if it is proved to its satisfaction that the appellant was prevented by any sufficient cause from furnishing the security within the time allowed. The attention of the Court in *Sankaralinga Chetti* v. *Annamalai Chetti*[4] was not drawn to this provision of law, since the Court specifically remarked that it had not been referred to any provision elsewhere in the Code under which such an application will lie.

The appellant's learned vakil argued that section 107, Civil Procedure Code could not apply to cases of appeals, because he argued, if it did apply there was no necessity to enact Order 41, Rule 10 at all since the provisions of Order 25 relating to the suits would, according to section 107 (*ii*), apply to appeals also. There is an answer to this contention. The power of the Court of first instance to demand security from plaintiffs is confined under Order 25 to cases of plaintiffs who are residents out of British India and to plaintiffs who are

4. (1908) 19 M.L.J. 304.

Srinivasam Pillai v. Rukmani Ammal.

Ananthakrishna Aiyar, J.

females in suits for money. The powers conferred by O. 41, R. 10 on an Appellate Court are far wider, as the wordings of Rule 10 would show, so that the legislature had to enact a separate provision. Conferring on Appellate Courts in respect of appeals wider powers than those conferred on Courts of first instance in respect of suits having thus made a specific provision in O. 41, R. 10, conferring on Appellate Courts far wider powers in the matter of directing appellants to furnish security for costs, the legislature has left the other provisions relating to such matters to be attracted and incorporated by the general provision regarding Appellate Court's powers mentioned in S. 107 (*ii*), Civil Procedure Code. There is no special reason why Courts of first instance should have the special power mentioned in O. 25, R. 2, sub-clause (2) and why Appellate Courts should not have that power. One should not consider the present as a case of *casus omissus* if it could be brought under any existing provision of law. For, as stated by Lord Fitzgerald in *Mersey Docks and Harbour Board* v. *Henderson Brothers*[10]

"We ought not to create a *casus omissus* by interpretation save in some cases of strong necessity."

See also Broom's Legal Maxims, 8th edition, page 33.

I have on the whole come to the conclusion that in the present case the Lower Appellate Court had jurisdiction to pass the orders in question; in any event I do not think that the present is a case in which we should interfere in the exercise of our power of revision, since I think that substantial justice has been done in the case as the result of the Subordinate Judge's orders.

As regards costs, I would make no orders as to costs of the proceedings in the High Court; but I would direct the plaintiff-appellant before the Lower Appellate Court to pay the respondent in the Lower Appellate Court the costs incurred by him in connection with I. A. No. 970 of 1926, including such pleader's fee as the Lower Appellate Court may fix in the matter, since the prayers in the several petitions Nos. 969 to 971 of 1926 are not all such as could be granted, and also because the whole trouble was caused by default of appearance on her part on the 13th February, 1926. Subject to this modification as to costs in I. A. No. 970 of 1926, I would dismiss both the appeals and revision petition but without costs in the High Court.

A.S.V. *Both Appeals and Petition dismissed.*

10. (1888) 13 A. C. 595 at 607.

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh.]

PRESENT:—LORD SHAW, LORD CARSON, LORD SALVESEN AND SIR JOHN WALLIS.

Gauri Nath Kakaji .. *Appellant** (*Deft.*)

v.

Musammat Gaya Kuar .. *Respondent* (*Plff.*).

P. C.

Gauri Nath Kakaji v. Mt. Gaya Kuar.

Hindu Law—Widow—Co-widows—Estate inherited by—Nature and incidents of—Partition between widows—Effect—Mortgage for necessary purposes by one widow—Binding character of, on co-widow—Mortgage without her concurrence—Concurrence not applied for—Concurrence applied for but improperly refused—Distinction

If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life-interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner If they (the widows) act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her life-time.

A mortgage by a Hindu widow, even for necessary purposes, without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband, so as to affect the interest of the co-widow.

Semble : When the concurrence of the co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such a debt granted only by the one widow might be held binding on what may be termed the corpus of the estate.

Held, that a mortgage by one widow, even for necessary purposes, was not binding upon the joint estate in the hands of the surviving widow, when the concurrence of the latter was not even applied for.

Judgment of the Chief Court affirmed.

Consolidated Appeals No. 74 of 1927 from one judgment and two decrees of the Chief Court, Lucknow (Sir Louis Stuart, Chief Judge and Mr. Justice Raza), dated the 4th March, 1926 reversing a judgment and decree of the Court of the Subordinate Judge of Hardoi, dated the 29th April, 1924.

The case in the Chief Court is reported in 94 Indian Cases 932: 1926 Oudh 401.

*P.C. Appeal No. 74 of 1927. 5th July, 1928.

P. C.

Gauri Nath Kakaji v. Mt. Gaya Kuar.

Lord Salvesen.

Dunne, K. C., K. Brown and *Dube* for appellant.

De Gruyther, K. C. and *Abdul Majid* for respondent.

5th July, 1928. Their Lordships' judgment was delivered by

LORD SALVESEN.—This appeal arises out of a suit at the instance of the surviving widow of Laiq Singh who was the owner of certain villages situate in the District of Hardoi. The plaintiff in that suit, who is the respondent here, prayed for decree for possession of the villages in question at that time in possession of the appellant under mortgages in favour of his author. The Subordinate Judge of Hardoi granted decree in the respondent's favour, but only on the footing that in so far as the mortgages which had been granted by the senior widow were justified by necessity, she was bound as a condition of obtaining possession to pay the amount due to the mortgagees. From his judgment an appeal was taken to the Chief Court of Oudh which by decree, dated the 4th March, 1926, reversed the judgment and decree, dated the 29th April, 1924, of the Subordinate Judge and held that the respondent was entitled to an unconditional decree for possession of the villages. From this decree the present appeal has been brought.

The material facts have been so fully dealt with in the judgment of the Chief Court of Oudh that it is unnecessary to recapitulate them except in the barest outline. The owner of the villages, Laiq Singh, was a Hindu who owned seven villages and shares in others. He died on the 13th August, 1885 and was survived by two widows, Musammat Umrao and the respondent. Prior to his death he had burdened his estate by mortgages for the principal sum of Rs. 28,000 bearing interest at the usual rate. This obligation was recognised by the widows and after a suit had been commenced by the mortgagees against them a compromise was effected in 1887 under which they agreed to divide the responsibility. Umrao Kunwar, who had at the time (presumably under an arrangement with her co-widow) obtained sole possession of a half share in the villages of Sakraori and Janwar, agreed to transfer the possession of this property to the mortgagees that they might enjoy the usufruct and repay themselves the principal sum of Rs. 15,983-6-0 and interest, while the respondent agreed to pay Rs. 17,779 in cash on condition that on such payment she was to be held under no liability in respect of her husband's mortgages. The respondent did in fact discharge this liability, but the senior widow

P. C.

Gauri Nath Kakaji v. Mt. Gaya Kuar.

Lord Salvesen.

did not put the mortgagees in possession of her share in the villages until some years thereafter. It has been, however, found as a fact that the rents of the villages collected by the mortgagees have long since extinguished the principal sum and interest due to them in respect of Laiq Singh's mortgages.

Following on this compromise the widows proceeded to partition Laiq Singh's property through the Revenue Courts, that is to say, as afterwards explained, to separate and divide the enjoyment of the widow's life-estate. In the final result the villages specified in the plaint were assigned to Umrao and the other villages to the respondent. During this period the relations between the two widows were anything but friendly. The senior widow had by a suit at the instance of a boy whom she said she had adopted with her husband's authority sought to deprive the respondent of any share in his inheritance. This suit failed.

In consequence of Umrao's failure to put the mortgagees in possession of her half share in the two villages they in 1889 raised an action against her. Ultimately it was arranged that the whole of Janwar which had fallen to Umrao at partition should be handed over to the mortgagees and that Sakraori should be exempted from any charges in respect of the deceased husband's debt. From this time forwards the two widows were entirely separate, each dealing with the properties that fell to them respectively under the partition as if they were separate owners of the life-estate therein.

On the 28th April, 1891, Umrao executed a mortgage for Rs. 38,000 in favour of the appellant and another. Under this deed she mortgaged with possession the four villages in suit, and on the 23rd August, 1891, she executed a deed in respect of further charges for Rs. 1,200. The first mortgage included the debt undertaken in terms of the compromise (since discharged out of the usufruct) and the balance consisted of further debts incurred by Umrao. Possession was ultimately obtained by the mortgagees in 1905.

Musammat Umrao died in 1908. The other widow, the respondent, brought the present suit within 12 years of her death. The sole question for our decision is whether these two mortgages of 1891 are valid and binding on the respondent who succeeded in 1908 to the villages by right of survivorship. This question of law has been decided by the Chief Court of Oudh in the negative.

P. C.

Gauri Nath Kakaji v. Mt. Gaya Kuar.

Lord Salvesen.

The general law is so well settled that it scarcely requires restatement. If a Hindu dies leaving two widows, they succeed as joint tenants with a right of survivorship. They are entitled to obtain a partition of separate portions of the property so that each may enjoy her equal share of the income accruing therefrom. Each can deal as she pleases with her own life-interest, but she cannot alienate any part of the corpus of the estate by gift or will so as to prejudice the rights of the survivor or a future reversioner. If they act together they can burden the reversion with any debts contracted owing to legal necessity, but one of them acting without the authority of the other, cannot prejudice the right of survivorship by burdening or alienating any part of the estate. The mere fact of partition between the two, while it gives each a right to the fruits of the separate estate assigned to her, does not imply a right to prejudice the claim of the survivor to enjoy the full fruits of the property during her life-time. These principles have been established by a long series of decisions, one of the earliest and most authoritative of which is a case of *Bhugwandeen Doobey* v. *Myna Baee*,[1] the head-note of which contains the following passage:—

> "Where a childless Hindu dies, leaving two widows surviving, they succeed by inheritance to their husband's property as one estate in co-parcenary, with a right of survivorship; and there can be no alienation or testamentary gift by one widow without the concurrence of the other"

In that case there had been a division effected by the Judge of Benares of the estate between the two widows and the argument was that such division having been acquiesced in, the estate of the one widow became a divided and separate estate which she was competent to leave to whomsoever she pleased. This contention was negatived by the Privy Council. In the course of his long and detailed judgment, Sir James Colvile said:

> "The estate of two widows who take their husband's property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property to the exclusion even of daughters of the deceased widow. They are, therefore, in the strict sense co-parceners, and between undivided co-parceners there can be no alienation by one without the consent of the other."

The authority of this case has not been questioned before the Board, but it was contended that as the Subordinate Judge found that the elder widow had incurred debts of necessity which she had charged by the mortgages in favour of the appellant upon the villages which had been assigned to her under the partition agreed upon by the parties and confirmed by the Court,

1. (1867) 11 M.I.A. 487.

P. C.

Gauri Nath Kakaji v. Mt. Gaya Kuar.

Lord Salvesen.

these mortgages were binding on the survivor. In support of this argument, he maintained that the respondent had impliedly consented to such a dealing by the elder widow with the property of which she had the sole management under the partition between them. Express consent was not alleged, and indeed under the only issue which deals with this matter it appears to be assumed that no consent was ever given. That issue is expressed in these terms:

"2. Were the said mortgages made for a legal necessity and for payment of antecedent debts? Are they for that reason binding on the plaintiff, even though they were not made with her consent?"

It was, however, contended that while no express consent was ever given, such consent is to be implied from the proved facts. Both Courts have found that no consent on the part of the respondent can be inferred to the granting of the mortgages which are charged. Their Lordships are quite content with the conclusion reached by the High Court, which is thus expressed:

"The most that this evidence can establish is that Umrao Kunwar and Gaya Kunwar each independently of one another in making transfers. Each asserted a right, which was not possessed, to deal absolutely with the property in her separate possession. . . . The circumstance that neither objected to a transfer made by the other cannot in our opinion be construed to mean more than that neither objected to the other making a transfer, provided that transfer did not affect her own interests in the event of her succeeding to the estate by survivorship . . . We find an absolute absence of evidence which would justify us in drawing a conclusion that Gaya Kunwar consented to the transfers in question"

There remains the question whether to the extent that the mortgages were made for a legal necessity they are binding on the respondent. This was not expressly decided by the case in *Bhugwandeen Doobey* v. *Myna Baee*[1] which dealt with a gratuitous alienation by one widow to the prejudice of the other, but it was made the subject of decision in the well-known case of *Gajapati Radhamani* v. *Pusapati Alakarajeswari*.[2] There it was held, as expressed in the head-note, that a mortgage by a Hindu widow, even for necessary purposes, without the concurrence of her co-widow is not binding upon the joint estate which has descended from their deceased husband so as to affect the interest of the co-widow, but the question was left open whether a "case for borrowing without the co-widow's consent could be established so as to empower one widow so to bind the estate," and

1. (1867) 11 M.I.A. 487.
2. (1892) L.R. 19 I.A. 184 : I.L.R. 16 M. 1 (P. C.).

P. C.
Gauri Nath Kakaji v. Mt. Gaya Kuar.
Lord Salvesen.

the only thing that was definitely decided was that it could not do so where the concurrence of the co-widow was not even applied for.

Their Lordships can conceive of cases where when the concurrence of the co-widow has been asked for to a borrowing by the other for necessary purposes and unreasonably refused, a mortgage for such a debt granted only by the one widow might be held binding on what may be termed the corpus of the estate. That case does not arise here. Umrao Kunwar never asked the respondent to consent to the granting of the mortgages in dispute. What attitude the respondent might have taken up had such a request been made can only be matter for conjecture.

The decision of the Board was pronounced in 1892 and, with the exception of two cases to which reference is afterwards made, it has been consistently followed.

The two cases which are founded on as forming an exception to the general current of authority are *Kalliyanasundaram Pillai* v. *Subba Moopanar*[3] and *Jai Narain Singh* v. *Munna Lal.*[4] In the former the head-note bears that "a mortgage executed by the senior widow for a necessary purpose without the concurrence of the junior widow will be binding upon the latter." This broad proposition is not supported by the actual decision, and it is explained in the recent case of *Valluru Appalasuri and others* v. *Sasapu Kannamma Nayuralu,*[5] on the footing that the Judges were of opinion on the facts of that case that the senior widow was recognised as manager or agent of the other, and that such an inference can be made only in a case where there was no known hostility between the widows and was not possible where (as in the present case) the widows were hostile to each other.

In the second case above referred to there was undoubtedly an expression of opinion by the learned Judges of the High Court of Allahabad that where two Hindu widows have separated for purposes of conveniently enjoying the estate left by the husband if one of them alienates a portion of the estate in her possession under the pressure of legal necessity, the reversioner is bound by such alienation. This opinion was not necessary for the decision of the case for the Court had already held that the widow who had not executed the mortgage deeds challenged was nevertheless a consenting party to this alienation. It may

3. (1902) 14 M.L.J. 139. 4. (1927) 26 All L.J. 268.
5. (1925) 49 M.L.J. 479.

P. C.

Gauri Nath Kakaji v. Mt. Gaya Kuar.

Lord Salvesen.

be noted that the case arose not between the survivor of the widows and the mortgagee but between the mortgagee and the reversioner after the death of both widows. The opinion of the High Court was therefore *obiter* and it is not consistent with the judgment of the Privy Council in *Gajapati Radhamani* v. *Pusapati Alakarajeswari.*[2]

Their Lordships will accordingly humbly advise His Majesty that the appeal should be dismissed with costs to the respondent.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondent: *Chapman, Walker* and *Shephard.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLACE.

Rani Kulandai Pandichi *alias* Kulandaivelu Nachiar and another .. *Petitioners** (*Plffs.*)

v.

Indran Ramaswami Pandia Thalavan (late a minor now declared a major and his guardian discharged—*vide* Order, dated 25th February, 1927 in C.M.P. No. 4556 of 1926) .. *Respondent* (*Deft.*).

Rani Kulandai Pandichi v. Ramaswami Pandia Thalavan.

Civil Procedure Code (V of 1908), S. 115—Order demanding additional court-fee—Revision—If entertainable—Court Fees Act, as amended by Madras Act V of 1922, S. 7, para (iv) (a) and Sch. II, Art. 17-A—Previous suit for possession of properties and for maintenance in the alternative—Compromise awarding maintenance and permitting withdrawal of suits as regards possession—Present suit to set aside compromise decree—Court-fee payable—Civil Procedure Code, S. 2 (2) and O. 23, R. 1—Order permitting withdrawal of suit—If amounts to a decree.

Where the Lower Court on an erroneous view of the court-fee payable refuses to proceed with the suit until the proper court-fee is paid, it fails to exercise the jurisdiction vested in it by law, as a party is entitled to have his case tried if he paid the proper court-fee, and consequently the order of the Lower Court calling upon the plaintiff to amend the valuation in the plaint and to pay additional court-fees is revisable by the High Court. The mere fact that an appeal will lie later on on the consequential order of dismissal of the suit by the Lower Court if the court-fee demanded is not paid, is no ground for refusing to entertain the petition to revise the order demanding the erroneous court-fee.

A previous suit for possession of properties with past and future mesne profits and in the alternative for maintenance and past maintenance was

---

* C.R.P. No. 852 of 1926. 4th November, 1927.

2. (1892) L.R. 19 I.A. 184: I.L.R. 16 M. 1 (P.C.).

Rani Kulandai Pandichi v. Ramaswami Pandia Thalavan.

compromised and a decree was passed in terms of the compromise. By this compromise, the plaintiffs withdrew their claim in respect of the immoveable properties and got a decree for maintenance. It was recited in the compromise that the claim for arrears of maintenance had been satisfied. The plaintiffs brought the present suit to set aside the compromise and the decree passed in the previous suit.

Held, that the effect of setting aside the compromise decree would be that the suit, which had been withdrawn and in respect of which full court-fee on the value of the property had been paid, would have to be proceeded with, and the setting aside of that decree would not by itself give any property to the plaintiffs but would only give them the right to prosecute a suit which, according to them, had been terminated in a manner which is not binding on them, and that, therefore, the proper court-fee payable was that payable under Art. 17-A of Sch. II of the Court Fees Act as amended by Madras Act V of 1922 and not under S. 7, para. (iv) (*a*).

An order permitting the withdrawal of a suit or appeal is not a "decree" within the meaning of the Civil Procedure Code.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order (finding), dated 24th September, 1926, of the Court of the Subordinate Judge of Tinnevelly in O.S. No. 66 of 1925.

T. L. Venkatarama Aiyar for petitioners.

S. T. Srinivasagopalachari for respondent.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—This revision petition arises out of an order of the Subordinate Judge calling upon the plaintiffs to amend the valuation in the plaint and to pay additional court-fees. The suit was to set aside the compromise and the rajinama decree passed in O.S. No. 35 of 1917. O.S. No. 35 of 1917 was filed by the present plaintiffs who claimed to be entitled to the zamindari of Thalavankottai. The prayers in the plaint were for possession of the properties in the schedules to the plaint with past and future mesne profits and in the alternative for maintenance at Rs. 250 a month and past maintenance. The suit was valued at Rs. 1,00,000 and a court-fee of Rs. 2,300 was paid. The suit was compromised and a rajinama decree was passed. By the rajinama the plaintiffs withdrew their claim in respect of the immoveable properties and got a decree for maintenance at Rs. 50 a month for each of them and also residence. It was recited in the rajinama that the claim for arrears of maintenance has been satisfied. A decree was passed in terms of the rajinama and it is to set aside this decree that the present suit has been filed. The question is whether

Rani Kulandai Pandichi v. Ramaswami Pandia Thalavan.

Kumaraswami Sastri, J.

stamp duty has to be paid on the claim as made in O.S. No. 35 of 1917 or only on the reliefs which the plaintiffs claim in the present suit and this turns on the construction of section 7, clause (iv) (a) of the Court Fees Act as amended.

A preliminary objection has been taken as to the maintainability of the Civil Revision Petition on the ground that an appeal would lie against an order dismissing the suit if court-fee was not paid. We are unable to uphold this contention. We think that where a Judge on an erroneous view of the court-fee payable refuses to proceed with the suit until the proper court-fee is paid, he fails to exercise jurisdiction as a party is entitled to have his case tried if he paid the court-fee. In *Sudalimuthu Pillai* v. *Sudalimuthu Pillai*,[1] Oldfield, J., held that in such cases the provisions of section 115, Civil Procedure Code, have been complied with. After negativing the contention that a conditional order, the non-compliance of which would entail the dismissal of the suit, is not revisable under section 115, the learned Judge observes:

"Generally it is impossible to hold that an order directing the dismissal of an appeal in case the payment is not made is not a refusal to exercise the jurisdiction in that appeal."

In *Dodda Sannekappa* v. *Sakravva*[2] it was held by Srinivasa Aiyangar, J., that in a suit for a declaration that certain transactions are not binding on the plaintiff, he is entitled to put his own valuation on the relief which he seeks, that the High Court can interfere in revision with an erroneous order for payment of deficient court-fee and that it is not necessary that the plaintiff should wait for the dismissal of the suit by disobeying the order and then move the High Court by way of appeal or revision. The learned Judge observes:

"A preliminary objection was taken by the respondent's Counsel that I should not interfere at this stage, but that the plaintiff should wait for a dismissal of his suit by disobeying the lower Court's order and then come up by way of appeal or revision."

In a case *Ramrup Das* v. *Mohunt Shiyaram Das*[3] the learned Judges held that an order like the present one was really an order declining to entertain jurisdiction unless certain things were done and in that view the High Court has power to interfere with that order. I follow that decision and hold that I have power to interfere at this stage.

In *Ramrup Das* v. *Mohunt Shiyaram Das*[3] the High Court interfered in revision where the order like the present one

1. (1922) 17 L.W. 623. 2. (1916) 36 I.C. 831.
3 (1910) 14 C.W.N. 932.

Rani Kulandai Pandichi v. Ramaswami Pandia Thalavan.

Kumaraswami Sastri, J.

simply directed payment of an additional sum as court-fees. The learned Judges, Holmwood and Chatterjee, JJ., in dealing with the preliminary objection that no revision lay, observed:

"But this Court has in more than one case recently interfered with interlocutory orders where such orders appear to be a denial of jurisdiction, and in this case to inform a member of the public who is presumed to bring a declaratory suit in the interest of the public that he cannot bring such a suit without valuing his plaint at the value of the property involved, does really in our opinion amount to shutting him out of the right of suit, and it would be useless to defer this matter until the plaintiff had by neglecting to take any further steps in the matter incurred the rejection of his plaint."

In *Karuppanna Thevar* v. *Angammal*[4] the suit was by a reversioner for a declaration that a particular alienation by the widow was not binding and for a receiver, and the question was what was the court-fee payable? A revision petition was filed against the order of the Subordinate Judge and a preliminary objection was taken as to whether a revision lay. Venkatasubba Rao, J., following the decisions in *Dodda Sannekappa* v. *Sakravva*[2] and *Ramrup Das* v. *Mohunt Shiyaram Das*[3] above referred to, held that the High Court could interfere in revision. In *Sudalimuthu Pillai* v. *Peria Sundaram Pillai*,[5] Krishnan, J., held that a revision would lie to the High Court against an erroneous order of the Subordinate Judge as to the proper court-fee payable. The learned Judge was of opinion that it was open to the Court to interfere because the question was really one of jurisdiction as the plaint would have to be rejected if proper stamp duty was not paid and that the remedy by way of appeal was a cumbrous remedy. A similar view was taken by Venkatasubba Rao, J., in *Venkataramani Aiyar* v. *Narayanaswami Aiyar*.[6]

A contrary view has, however, been taken by Phillips, J., in *Acha* v. *Sankaran*.[7] The learned Judge distinguished the case in *Sudalimuthu Pillai* v. *Sudalimuthu Pillai*[1] above referred to on the ground that in that case the order demanding additional court-fee was coupled with an order of dismissal in case of default. It is difficult to see how the mere addition of the consequence which would under Rule 11 of Order VII, Civil Procedure Code, follow from the non-payment of the court-fee demanded would make any difference, as the same consequence would follow even if the order was silent as to what was to be

1. (1922) 17 L.W. 623.
2 (1916) 36 I.C. 831.
3. (1910) 14 C.W.N. 932.
4. (1926) 51 M.L.J. 67.
5. (1924) 48 M.L.J. 514.
6 (1924) 48 M.L.J. 688.
7. (1926) 50 M.L.J. 497.

Rani Kolandai Pandichi v. Ramaswami Pandia Thalavan.

Kumaraswami Sastri, J.

done in the case of non-payment. The other Madras decisions above referred to were not brought to the notice of the learned Judge and he preferred to follow the decision of the Patna High Court in *Mt. Lachmibati Kumari* v. *Nandkumar Singh*,[8] which view Krishnan, J., was not inclined to follow and the decision of the Calcutta High Court in *Gobindu Nath Doss* v. *Nitya Kali Dasi*.[9] In *Chinnasami Pillai* v. *Pavayee Ammal*[10] Waller, J., followed the decision of Phillips, J., in *Acha* v. *Sankaran*,[7] and observed that although other Judges of this Court have taken a different view, he prefers to follow the view of Phillips, J., on the ground that the petitioner has other remedies open to him and that it is no answer to say that the appropriate remedy was more cumbrous.

It seems to us that, while Courts would not generally interfere in revision where an equally efficacious remedy is open to the party, they have in several cases interfered where the remedy by way of appeal would entail unnecessary hardships on the party, involve multiplicity of proceedings or would not give the party as complete and efficacious a relief as interference with an interlocutory order, and the case satisfied the requirements of S. 115, Civil Procedure Code. In the present case the plaintiffs will have to pay an additional stamp duty of over Rs. 1,000 and then raise the question in appeal from the decree which the Subordinate Judge may pass as to the stamp duty leviable or refuse to pay the stamp duty ordered which would entail the necessary consequence of getting the suit dismissed and then appeal to the High Court. The appeal will have to be stamped with the full stamp duty and, if the Lower Court was wrong, they would have to apply for a refund and get it later on. It may be that the party is not able to pay the additional stamp duty required in which case he will have to file the appeal as a pauper. It is difficult to see why, if the case is one of declining to exercise jurisdiction and the requirements of section 115 are otherwise satisfied, the High Court should decline to interfere when by timely interference it will save a great deal of unnecessary hardship. We think the mere fact that an appeal would lie later on, on the consequential orders passed by the Subordinate Judge if the stamp is not paid, is no ground for refusing to entertain the petition to revise the order demanding an erroneous court-fee and declining to proceed with the suit unless the sum erroneously demanded is paid.

We overrule the preliminary objection.

7. (1926) 50 M L.J. 497
8. (1920) 5 Pat. L.J. 400.
9. (1919) 51 I.C. 581.
10. (1927) 102 I.C. 877.

Rani Kulandai Pandichi v. Ramaswami Pandia Thalavan.

Kumaraswami Sastri, J.

As regards the proper court-fee, the decree which is sought to be set aside simply states that the suit as regards the immoveable properties is withdrawn and the only relief granted by the decree is the payment of maintenance. The compromise or the decree does not also give any relief or confer any rights as regards the moveable property claimed but only allows maintenance. The Court Fees Amendment (Madras) Act (V of 1922) adds the following paragraph as (iv) (*a*) between paras. (iv) and (v) of the principal Act. Para. (iv) (*a*) runs as follows:—

"In a suit for cancellation of a decree for money or other property having a money value or other document securing money or other property having such value,

according to the subject-matter of the suit, and such value shall be deemed to be, if the whole decree or other document is sought to be cancelled, the amount or the value of the property for which the decree was passed or the other document executed,

if a part of the decree or other document is sought to be cancelled, such part of the amount or value of the property."

It is difficult to see how the compromise decree which is sought to be set aside secures to the plaintiffs anything except the maintenance awarded. It does not secure to them any immoveable property. The effect of setting aside the compromise decree will be that the suit which has been withdrawn and in respect of which full court-fee on the value of the property has been paid would have to be proceeded with and it is clear that the setting aside of the compromise decree would not by itself give any property to the plaintiffs but would only give them the right to prosecute a suit which according to them has been terminated in a manner which is not binding on them owing to fraud and other circumstances set out in the present plaint.

Permission to withdraw a suit decides no matters in controversy and does not confer any rights on a party, and the fact that the person withdrawing is precluded from bringing a fresh suit on the same cause of action cannot be said to have that effect. It has been held that an order permitting the withdrawal of a suit or appeal is not a decree within the meaning of the Civil Procedure Code. We need only refer to *Patlogi* v. *Ganu*,[11] *Jogodindra Nath* v. *Sarat Sundari Debi*[12] and *Abdul Hussain* v. *Kasi Sahu*.[13]

We think the proper court-fee payable is that payable under Art. 17-A of Sch. II of the Court Fees Act as amended by

11. (1891) I.L.R. 15 B. 370. 12. (1891) I.L.R. 18 C. 322.
13. (1900) I.L.R. 27 C. 362.

Madras Act V of 1922. It is conceded that the value of the suit for purposes of jurisdiction is over Rs. 10,000 and we think the court-fee payable would be Rs. 500. We set aside the order of the Subordinate Judge and direct that the petitioners do pay the difference between the court-fee actually paid and Rs. 500 which we hold is the fee payable within two months from this date. Costs of this petition will abide and follow the result of the suit.

Rani Kulandai Pandichi v. Ramaswami Pandia Thalavan.

Kumaraswami Sastri, J.

N.S. *Civil Revision Petition allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM, MR. JUSTICE WALLER AND MR. JUSTICE JACKSON.

Chinna Thimmappa and others .. *Petitioners** (*Appellants* 1 *to* 12; *Accused* 1 *to* 4, 9, 11, 12, 14 *and* 17 *to* 20)

v.

Talukunta Timmappa .. *Complainant.*

F. B.

Thimmappa v. Timmappa.

Criminal Procedure Code (V of 1898), *S* 162 (1), *para.* (1)—*"Any such statement"—If covers oral statements.*

The words "any such statement" in the first paragraph of clause (1) of S. 162 of the Criminal Procedure Code cover not only written statements but also oral statements

King-Emperor v. *Maung Tha Din,* (1926) I.L.R. 4 Rang. 72 (F.B) followed.

Venkatasubbiah v. *King-Emperor,* (1924) I.L.R. 48 Mad. 640: 48 M.L.J. 195 overruled.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the conviction and sentence of the Court of Sessions of the Anantapur Division, dated 29th September, 1927, and made in Criminal Appeal No. 19 of 1927 preferred against the judgment in C.C. No. 18 of 1927 on the file of the Court of the Sub-divisional Magistrate, Gooty.

Nugent Grant and *C. Sambasiva Rao* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court (Chief Justice and Madhavan Nair, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH. *The Chief Justice.*—In this case a number of accused have been convicted

Coutts-Trotter, C. J.

*Cr. Rev. Case No. 821 of 1927. 25th April, 1928.
(Cr. Rev./P. No. 731 of 1927).

F. B.
Thimmappa
v.
Timmappa
Coutts-Trotter, C. J.

of rioting and various offences arising out of the riot. They were convicted by the Sub-divisional Magistrate and the conviction was affirmed by the learned Sessions Judge. The learned Sessions Judge was obviously much influenced by the decision of the Magistrate and really did little more than to examine whether there was anything to invalidate the conviction by the Magistrate. That may be a perfectly proper method of approaching a case of this nature for the Magistrate saw the witnesses and the Judge did not, but if in such a state of things the Magistrate clearly acted on inadmissible evidence it would almost be impossible to support the decision of the learned Judge. The learned Judge's concluding statement in paragraph 5 of his judgment is one that we cannot accept. The evidence challenged as inadmissible was evidence of statements made to the police by various witnesses for the prosecution and put before the Magistrate in support of the prosecution case and in corroboration of the prosecution witnesses. The learned Judge makes the following statement:

"Moreover in spite of the fact that the Magistrate has frequently written that evidence is corroborated by early statements to the police he has in fact only used the statements to the police for the benefit of the accused."

How the learned Judge came to say that I cannot understand. We have been taken by Mr. Grant carefully through the judgment of the Magistrate from paragraph 8 onwards and in paragraph 8 which really contains his conclusions there are no less than 7 instances in which he has referred to the impugned evidence as corroboration of the story told to him in the witness box. I think it right to enumerate these instances and will refer to them briefly. On page 17, line 39, he is dealing with accused 1 and with the evidence of P. W. 8, that accused 1 threw a stone at him, and he says : "he (*i.e.*, P.W. 8) mentioned about him (*i.e.*, accused 1) even before the police." On page 18, line 17, he is dealing with the evidence of P.W. 3 as to the part taken in the affair by accused 3. He says this : "But P. W. 3 himself stated before the police in the very beginning that accused 3 had done this" (*i.e.*, taken part in the riot, as may be seen from P.W. 15's evidence). On page 19, line 9, he is dealing with accused 9 in this case and referring to P.W. 8 he says : "he even mentioned about him to the police shortly after this offence." In line 21 he is dealing with accused 11 and the evidence of P.W. 5 against him and says : "he (*i.e.*, P.W. 5) mentioned about this even before the police in the very beginning." In line 36 he goes on to the case of accused 14 and

F. B.

Thimmappa
v.
Timmappa.

Coutts-Trotter, C.J.

accused 17 to 20 and says : "these accused were mentioned even in the police investigation" and again in line 43 "their evidence (*i.e.*, the prosecution witnesses who had spoken to these particular accused) so far as it is corroborated by the information furnished by them to the police shortly after the offence before they had time to be tutored by the interested party leaders deserved credit." Then he speaks of the value of the testimony of P.Ws. 9, 11 and 14 and at page 20, line 12, he says this : "But their evidence so far as it has been corroborated by the information furnished by them in the very beginning may safely be accepted."

It appears to be abundantly clear that the Magistrate in many instances relied upon the oral statements made to the police as corroborative evidence and before we embark on the task of deciding whether there was enough direct evidence to warrant the convictions, we think it desirable to have the opinion of a Full Bench as to whether these statements were or were not admissible.

That question depends upon the construction to be placed upon section 162 of the Code of Criminal Procedure in its amended form. In its original form it referred in terms to a written statement made to a police officer in the course of an investigation and in terms declared it to be inadmissible. This Court held in *King-Emperor* v. *Nilakanta*[1] and *Muthukumaraswami Pillai* v. *King-Emperor*[2] that it did not forbid the admission of oral statements made to the Police in the course of an investigation. Whether that was correct or not now worth discussing. We are really concerned with the altered language of the section of the Act of 1923. It is argued that the language there used is intended to be much wider and expressly to exclude oral as well as written statements made to the Police. A Bench of this Court in *Venkatasubbiah* v. *King-Emperor*[3] has held that the later section does not any more than did the earlier exclude the use of oral statements made to the Police in corroboration of the witnesses who made them.

This is in conflict with *King-Emperor* v. *Maung Tha Din*[4] and *Emperor* v. *Vithu Balu Kharat*,[5] and apparently with two cases in the Punjab High Court, *Labh Singh* v. *The Crown*[6] and

1. (1912) I.L.R. 35 M. 247: 22 M.L.J. 490 (F.B.).
2 (1912) I.L.R. 35 M. 397: 22 M.L.J. 490 (537) (F.B.).
3. (1924) I.L.R. 48 M. 640: 48 M.L.J. 195.
4. (1926) I.L.R. 4 R. 72 (F.B.).
5. (1924) 26 Bom. L.R. 965.
6. (1924) I.L.R. 6 Lah. 24.

F. B.

Thimmappa v. Timmappa.

Coutts-Trotter, C.J.

Rakha v. *The Crown.*[7] In these circumstances we think that an authoritative ruling ought to be given by a Full Bench for the guidance of this Court.

I do not propose to discuss the matter at length in this Referring Judgment and will only briefly refer to two of my own difficulties, in accepting the authority of *Venkatasubbiah* v. *King-Emperor.*[3] The first is that if the words in the present section "any such statement" are to be confined to statements reduced to writing, I can attach no meaning whatever to the words that follow "or any record thereof" which I should have thought pointed unmistakably to two things (*a*) an oral statement, (*b*) a written record of it. I cannot readily understand what is supposed to be contemplated by a "record" (obviously Police record) of a statement which is already in the hands of the Police in a written form.

In the next place it seems to me difficult to suppose that the policy of the section can really have been to exclude written statements where at least the document is a check on what was actually said at the time and to let in the unfettered and unchecked evidence of Police men as to statements orally made to them. It is no doubt true that if the decision in *King-Emperor* v. *Nilakanta*[1] and *Muthukumaraswami Pillai* v. *King-Emperor*[2] is right, that was the result of the old section. If it was, I cannot help suspecting that the section was so drafted as to produce this result *per incuriam*. Further, I do not appreciate what can be supposed to have been the object of the altered language unless it was to prevent a repetition of the construction adopted in *King-Emperor* v. *Nilakanta*[1] and *Muthukumaraswami Pillai* v. *King-Emperor.*[2] However at this stage I wish to do no more than to indicate my own difficulties for the consideration of a Full Bench whose business will be to decide the point for us.

Madhavan Nair, J.

Madhavan Nair, J.—As the question is obviously one of considerable importance, I agree that it may be referred to a Full Bench. Since we decided that we need not hear arguments at this stage, I refrain from discussing the question in the order of Reference.

V. L. Ethiraj, T. Appaji Rao for *Nugent Grant* and *C. Sambasiva Rao* for petitioners.

K. P. M. Menon, the Public Prosecutor (in charge), on behalf of the Crown.

---

1. (1912) I.L.R. 35 M. 247: 22 M.L.J. 490 (F.B.).
2. (1912) I.L.R. 35 M. 397: 22 M.L.J. 490 (537) (F.B.).
3. (1924) I.L.R. 48 M. 640: 48 M.L.J. 195.
7. (1925) I.L.R. 6 Lah. 171.

F. B.

Thimmappa
v.
Timmappa.

Ramesam, J.

The Court expressed the following

OPINION. *Ramesam, J.*—The question referred to the Full Bench in this case relates to the construction of section 162 of the Criminal Procedure Code, that is, whether the words "any such statement" in the first paragraph of clause (1) of the section cover only written statements or oral statements as well. The section has been the subject of consideration in a Full Bench decision of the High Court at Rangoon reported in *King-Emperor* v. *Maung Tha Din.*[4] One may begin the consideration of the section by assuming that, at first sight, two different constructions are possible. The two possible constructions are stated by Rutledge, C. J., at page 80. They are (1) a statement made by any person to a police officer in the course of an investigation under Chapter XIV, and (2) a statement made to a police officer in the course of an investigation under Chapter XIV and reduced into writing. The difference between the two meanings consists in that the second meaning contains an additional qualification, namely "being reduced into writing." The question is, which of these is to be adopted?

The pronominal use of the word "such" is a verv common expedient in legislation to avoid repetition of a long descriptive phrase or clause used earlier. We have to ascertain what are the words the repetition of which is intended to be avoided by the use of the word "such". The phrase "such statement" is intended to avoid a repetition of the statement already described. What are the words descriptive of the statement already used? The words are, "made by any person to a police officer in the course of an investigation under this Chapter". These are the only words descriptive of the word "statement" earlier in the section, and presumably it is to avoid the repetition of such description that the word "such" is used in the next clause. The words "reduced into writing" are not parts of the description of the word "statement" in the opening clause. If the word "such" is intended to cover also the words "reduced into writing" the earlier part of the section would have run as follows:

"No statement made by any person to a police officer in the course of an investigation under this Chapter and reduced into writing shall . . . ."

The legislature has instead of using this form deliberately avoided it and chosen to introduce the words "reduced into writing" into a conditional clause qualifying the verb "shall be signed" and not into a clause descriptive of the word "statement". It seems to me therefore that, looking at the grammatical form

4. (1926) I.L.R. 4 R. 72 (F.B.).

F. B.

Thimmappa v. Timmappa.

Ramesam, J.

chosen by the legislature, the supposed ambiguity vanishes and the clause is capable of only one meaning, namely, the first of the two mentioned. This conclusion is strengthened by the phrase "or any record thereof" as pointed out by Rutledge, C. J., in the case already quoted and by the learned Chief Justice in the referring judgment. The opposite conclusion was arrived at by Wallace and Madhavan Nair, JJ., in the decision in *Venkatasubbiah v. King-Emperor.*[3] One of the considerations which weighed with our brother Wallace, J., in that decision was that the provisos refer only to written statements. In the first proviso the words "such writing" make the matter clear beyond any ambiguity and the words "such statement" used further on in the proviso and in the second proviso obviously could refer only to written statements. But it does not follow that, because the provisos clearly refer only to written statements, the main paragraph of clause (1) may not be wide enough to cover both oral and written statements. Another argument relied on by Wallace, J., has reference to section 27 of the Evidence Act. He thought that, if section 162 includes also oral statements, then the information given by the accused in custody to a police officer leading to the discovery of some fact would be inadmissible under section 162. But it has always been held to be admissible under section 27 read as a proviso to section 25 of the Evidence Act. This is one of the points considered by the decision in Rangoon above referred to and it was there held that section 27 is not controlled by section 162. It is not one of the points referred to us; but we have got to deal with it as an argument relied on by Wallace, J., in *Venkatasubbiah* v. *King-Emperor.*[3] It seems to me that section 162 relates generally to the admissibility of statements and it says that statements described in that section are inadmissible. Section 27 relates to a more particular matter. It creates an exception to the general inadmissibility of statements made to a police officer, namely, where the statement consists of information received from the accused in custody in consequence of which a certain fact is discovered. On the principle that a general rule is affected by a special rule and not the special by the general rule, I am of opinion that section 27 is not affected by section 162 of the Criminal Procedure Code, but section 162 (Cr. P. C.) is affected by section 27 of the Evidence Act. The result is not that the construction of section 162 which I indicated above cannot stand but that a special exception to it exists in the circumstances men-

3. (1924) I.L.R. 48 M 640: 48 M.L.J. 195.

F. B.

Thimmappa v. Timmappa.

Ramesam, J.

tioned in section 27 of the Indian Evidence Act. In cases not covered by the exception section 162 as interpreted by me above continues to operate. The view indicated above is also the view taken in all the other High Courts besides Rangoon. Vide *Labh Singh* v. *The Crown*,[5] *Rakha* v. *The Crown*,[6] *Bahadur Singh* v. *The Crown*,[7] *Emperor* v. *Vithu Balu Kharat*[8] and *Asimuddy* v. *Emperor*.[9]

It is unnecessary to refer to cases on the section as it stood prior to the amendment in 1923. If it is strictly permissible to consider all those cases, one would probably come to the conclusion that the legislature has redrafted the section so as to avoid the conflict that existed prior to the amendment. But it is unnecessary to pursue this line of argument any further. My opinion is that the words "shall any such statement . . . . be used" in the first paragraph of the section apply to both oral and written statements.

Waller, J.

Waller, J.—I agree and have nothing to add.

Jackson, J.

Jackson, J.—I agree and would only add that the law as now determined leaves room for several anomalies.

Suppose a Sub-Inspector has questioned a witness early in the investigation, and on his replying that he knew nothing, has put nothing in writing. This witness subsequently appears for the prosecution; but the accused cannot prove his oral statement to the Police that he knew nothing. Proviso 1 to section 162 only covers a written statement.

Suppose a witness depose at the preliminary inquiry and then die. His deposition is evidence under section 33 of the Indian Evidence Act. But if the accused wish to compare that evidence with what the Police recorded from this witness in the course of the investigation, he cannot do so. Because the witness is not "called", as provided in section 162.

Suppose a Police Inspector wants corruptly to prove a false confession. Under section 25 of the Indian Evidence Act, he cannot. But under section 27, he can always say, the accused told me where he had hid such and such property or implement and the confession goes in. In fact as regards safeguarding an accused from Police machination, section 27 renders section 25 nugatory.

---

5 (1924) 26 Bom L.R. 965.
6. (1924) I.L.R. 6 Lah 24
7. (1925) I.L.R. 6 Lah. 171.
8. (1926) I.L.R. 7 Lah. 264.
9 (1926) I.L.R. 54 C. 237.

F. B.
Thimmappa
v.
Timmappa.
Jackson, J.

Suppose an Inspector learns from a person hitherto unsuspected that property is hidden somewhere, finds the property and arrests his informant. He cannot under section 162 prove that information. He must be careful to arrest the man first and then, under our ruling, section 27 will specially apply. So the statement of a man at liberty and free of Police control is withheld from the Court, while that of a man in custody who may well have been himself led as much as he led others to the place of discovery is acceptable evidence. The worse goes in and the better is ruled out. The remedy lies, in my opinion, in the legislature ceasing to erect artificial barriers in the way of evidence. At one time apparently it was assumed that Courts in India could not be trusted to handle Police evidence. A confession may be good evidence and a corroborative statement may have force; how far such evidence may be believed if it rests upon Police testimony is a question of fact which is left for the Courts, except in India, to decide for themselves. It seems unnecessary any longer to make an exception of India and to keep her Courts in statutory tutelage. There is no likelihood that undue deference will be paid to Police evidence, the tendency is all the other way; nor any probability that the Courts will be flooded with confessions and corroborative statements. But occasionally the ends of justice are furthered by evidence of this sort, and whether in each particular case the evidence is credible, Indian Courts, at least in this Presidency, are quite competent to decide. I would allow a Policeman to prove anything which under the ordinary law of evidence is relevant, just as he does in England, and I presume, in the Dominions.

N.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE SRINIVASA AIYANGAR.

Thanmul Sowcar .. *Appellant** (*2nd Deft.*)

v.

Nattu Ramadoss Reddiar and another .. *Respondent* (*Plff. and 1st Deft.*).

Thanmul
Sowcar
v.
Ramadoss
Reddiar.

Transfer of Property Act (IV of 1882), S. 81—Applicability and effect—First mortgagee—Suit to enforce mortgage against one item of mortgaged property only—Second mortgagee of that item—Right of, to compel plaintiff to proceed first against other item and to apply to have owner thereof impleaded.

---

*S.A. No. 260 of 1925. 19th December, 1927.

Thanmul Sowcar v. Ramadoss Reddiar.

The first mortgagee of A and B Schedule properties sued to enforce his mortgage as against A Schedule property only, giving up his right over B Schedule property on the ground that it had been sold by the mortgagor to a third party. The 2nd defendant, who was a second mortgagee of A Schedule property and the purchaser of the equity of redemption therein, contended that he, as second mortgagee, was entitled to compel the plaintiff to bring the B Schedule property to sale before proceeding against the A Schedule property and that for that purpose he was entitled to apply to have the purchaser of the B Schedule property made a party to the suit.

Held, that the 2nd defendant was not so entitled.

The first mortgagee has an undoubted right to recover the whole of his mortgage debt from any portion of the mortgaged property, and that right cannot be interfered with in the suit as framed.

Per Srinivasa Aiyangar, J.—The right declared in S. 81 of the Transfer of Property Act is only as between the second mortgagee and the mortgagor.

Second appeal against the decree of the District Court of Chingleput in A.S. No. 144 of 1923 preferred against the decree of the Court of the Subordinate Judge of Chingleput in O.S. No. 27 of 1922.

Muhammad Ibrahim and *G. Ramakrishna Aiyar* for appellant.

C. Narasimhachariar for respondent.

The Court delivered the following

JUDGMENTS. *Wallace, J.*—The plaintiff is a first mortgagee and is suing to enforce his mortgage which runs over A and B Schedule properties. In the suit he gave up his right over B Schedule property on the ground that his mortgagor, the 1st defendant, had sold it to one Narasimhalu Chetti and had credited the sale price to the interest of the mortgage. The 2nd defendant, the appellant, has been joined in the suit as the purchaser of the equity of redemption in A Schedule property. He also appears to be the second mortgagee of A Schedule property. He claims that in this suit he is entitled as second mortgagee so to marshal the burdens on A and B Schedule properties as to compel the plaintiff to bring the B Schedule property to sale and recover from it as much of his mortgage debt as he can before he proceeds against A Schedule property and for that end the appellant maintains that his petition to bring the B Schedule property purchaser Narasimhalu Chetti on the record in order that this claim might be fought out in the suit was improperly rejected by the lower Court. Wallace, J.

The validity of his claim turns on the correct interpretation of section 81 of the Transfer of Property Act. That section lays down in terms that the result of marshalling shall not pre-

Thanmul Sowcar v. Ramadoss Reddiar.

Wallace, J.

judice the rights of the first mortgagee. Now one of the rights of the mortgagee undoubtedly is to choose against which of several properties mortgaged to him he may proceed and he therefore cannot be hampered in such election by any consideration of obligation undertaken to others by his mortgagor subsequent to the contract with himself. It might be argued that he is not prejudiced in being compelled to proceed against the properties in any particular order so long as he recovers his money which is all he is concerned with. But that is not the way in which the law on the subject of marshalling has been interpreted. The English law on the subject has usually been held to spring from a case decided by the Lord Chancellor Lord Hardwicke in *Lanoy* v. *The Duke of Athol*,[1] where the proposition is stated in broad terms.

"Suppose a person, who has two real estates, mortgages both to one person and afterwards only one estate to a second mortgagee who had no notice of the first, the Courts in order to relieve the second mortgagee have directed the first to take his satisfaction out of that estate only which is not in mortgage to the second mortgagee"

In *Flint* v. *Howard*[2] Kay, L. J., quotes Lord Chancellor Hardwicke's dictum as being that

"If a person having two estates mortgaged both to A and then one only to B who had no notice of A's mortgage, B might, *as against the mortgagor*, compel the payment of the first mortgage out of the estate on which he had no charge."

And later on in the same judgment he says:

"The right of a subsequent mortgagee of one of the estates to marshal is an equity which is not enforced against third parties, that is against any one except the mortgagor and his legal representatives."

This is subject to one reservation that if both estates are subject to separate second mortgages the Court will apportion the first mortgage between them. This latter principle, however, is based rather on the doctrine of contribution than on the doctrine of marshalling and will be governed in India by section 82 of the Transfer of Property Act. In *Manks* v. *Whiteley*[3] Parker, J., lays down that the equitable right of marshalling has never been held to prevent a prior mortgagee from realising his security in such a manner and order as he thinks fit. In equity jurisdiction the general principle which will govern the action of the Court when it is possible is that

"a person having two funds shall not by his election disappoint a party having only one fund; and equity, to satisfy both, will throw him, who has

1. (1742) 2 Atk. 444.

2. (1893) 2 Ch. 54 at 72.

3 (1911) Ch 448.

Thanmul Sowcar v. Ramadoss Reddiar.

Wallace, J.

two funds upon that which can be affected by him only, to the intent that the only fund, to which the other has access, may remain clear to him."

That is the dictum of Lord Chancellor Eldon in *Aldrich* v. *Cooper*.[4] But it is one thing to say that in an administration suit where all the assets are in Court the Court will in equity so marshal the assets that one creditor shall not prejudice the rights of another, and a different thing for a Court in an ordinary action on a mortgage to compel the mortgagee to forego rights which the law itself gives him. In the above case the judgment of the Lord Chancellor concludes:

"If it is necessary for the payment of the creditors, that the mortgagee should be compelled to take his satisfaction out of the copyhold estate, if he takes it out of the freehold, those, who are thereby disappointed, must stand in his place as to the copyhold estate."

Therefore, if the mortgagee does as a matter of fact exercise his undoubted right to satisfy himself out of one estate, the second mortgagee whose security is thereby taken away or impaired will be entitled to stand in his shoes as regards the other estate; and that is really the principle which governs the present case. *Aldrich* v. *Cooper*[4] is no authority for the contention that the Court will in an action like the present compel the mortgagee to forego his undoubted right of satisfying his debts out of any portion of his security. 2nd defendant is therefore not entitled in this case to compel the 1st defendant to satisfy his debt first out of B Schedule property. But in a properly framed suit with the proper parties on record he may claim to hold B Schedule property liable for his own debt *pro tanto*.

It may be pointed out that in the analogous section 56 of the Transfer of Property Act it is also made clear by the wording of that section that a charge-holder is not to be prejudiced by a sale of the property over which he holds that charge and that the buyer's claim is against the seller and not against the charge-holder also. In *Perumal Pillai* v. *Raman Chettiar*[5] a Full Bench of this Court has held that the purchaser of the equity of redemption in one of several items mortgaged under one mortgage cannot prevent the mortgagee from satisfying his debt out of the properties sold to him since the mortgagee's undoubted right is to recover the whole of his mortgage debt from any portion of the mortgage property. The principle here is the same, that the mortgagee's original rights cannot be prejudiced by any action taken by third parties after his mortgage.

4. (1803) 8 Ves. (Junior) 382 at 395.
5. (1917) I.L.R. 40 M. 968: 33 M.L.J. 211 (F.B.).

Thanmul Sowcar v. Ramadoss Reddiar.

Wallace, J.

The question whether the appellant had notice of the first mortgage, therefore, does not arise in this suit, which is entirely in order to settle the claim of the first mortgagee over the mortgaged property. I agree, therefore, with the Lower Appellate Court that the mortgagee's rights to recover from A Schedule property cannot be interfered with in this suit by any second mortgage claim of the appellant over that property, and that the suit was rightly decided. I would, therefore, dismiss this appeal with costs.

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—I agree with my learned brother that the appeal is not sustainable and must be dismissed with costs. In his judgment he has dealt with all the cases to which reference has been made in the course of the discussion of the point. I shall, therefore, merely content myself with referring to the terms of section 81 of the Transfer of Property Act which alone in my judgment should be regarded, because in and by that section the legislature has undoubtedly sought to embody the rule of equity relating to marshalling. It is no doubt true that on a superficial reading of the section the contention put forward by Mr. Ramakrishna Aiyar, the learned vakil for the appellant, would almost seem to be insuperable. A close examination however of the language seems to my mind to leave no doubt in the matter. If it be conceded that a mortgagee has the right of proceeding against all or any part of the securities under his mortgage and in any order he pleases, then it must be conceded that the recognition of any right on the part of the subsequent mortgagee of one of the items of the security, to require the mortgagee to proceed in the first instance against the item not mortgaged to him would undoubtedly be interfering with such rights and, therefore, prejudicing the same. But apart from that altogether, the language used with regard to the right of the second mortgagee is that he is entitled to have the debt of the first mortgagee satisfied out of the property not mortgaged to the second mortgagee. The obligation corresponding to his right could, having regard to the language, be regarded as being only on the mortgagor and not against the first mortgagee.

If it was the intention of the legislature that in such cases the first mortgagee should first proceed against the property not mortgaged to the second mortgagee, the legislature would have had no difficulty in giving clear and direct expression to the same. When the right is stated "to have the debt of the first mortgagee satisfied" the persons liable to satisfy the same being

Thanmul Sowcar v. Ramadoss Reddiar.

Srinivasa Aiyangar, J.

only the mortgagor, the implication is clear and conclusive that the right declared in this section is only as between the second mortgagee and the mortgagor, and is intended for the purpose, by such declaration of right, of adjusting the equities as between them.

In the present case it is perfectly clear that where the other item of security with reference to which alone the question can possibly arise is not the subject-matter of the suit, the subsequent mortgagee has no right whatever to require both the things to be done for his benefit, namely, that the other property should, by some amendment, be brought in as the subject-matter of the suit and that for that purpose the alienee of such property should also be made a party to the litigation.

It is impossible to accede to any such contention, because a Court has only to decide the matters and points that arise as between the parties actually before it for the purpose of according the proper relief to the plaintiff.

A.S.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE SRINIVASA AIYANGAR.

Thiruvengadaswami Aiyangar .. *Appellant and Petitioner** *(Respondent)*

v.

Govindaswami Udayar and others .. *Respondents in both* *(Petitioners).*

Thiruvengadaswami Aiyangar v. Govindaswami Udayar.

Civil Procedure Code (V of 1908), O. 21, R. 66—Proclamation of sale—Valuation of property to be inserted in—Fixing of—Court if under a duty as to—Order of Court fixing valuation—Appeal from—Right of—S. 47 of Civil Procedure Code—Valuations of decree-holder, judgment-debtor and Commissioner appointed in the case—Insertion of, in proclamation—Propriety of—Order directing such insertion—Appeal from, under S. 47, Civil Procedure Code—Right of.

Under O. 21, R. 66 of the Code the Court is under no obligation whatever to fix in the proclamation of sale its own valuation of the property to be sold. But if it does so, its act in doing so would be a judicial act, the question as to the real value to be fixed might be one arising between the parties to the suit and relating to the execution of the decree within the meaning of S. 47 of the Code, and an appeal might be against the order fixing the valuation.

---

*A.A.O. No. 197 of 1927. 3rd November, 1927.
C.R.P. No. 587 of 1927.

Thiruvengadaswami Aiyangar v. Govindaswami Udayar.

There is nothing irregular in the Court directing that in the proclamation of sale reference should be made to the estimated value of the property as stated on one side by the decree-holder and on the other by the judgment-debtor and also as fixed by the Commissioner appointed in the case. No appeal lies under S. 47 of Civil Procedure Code against the order giving such a direction.

Appeal against and petition under section 115 of Act V of 1908 and section 107 of the Government of India Act to revise the order of the Court of the Subordinate Judge of Tanjore, dated 28th February, 1927 and passed in E.P. No. 215 of 1926 in O.S. No. 73 of 1925.

K. S. Krishnaswami Aiyangar and *V. N. Venkatavaradachariar* for appellant and petitioner.

K. V. Krishnaswami Aiyar and *A. V. Viswanatha Sastri* for respondents in both.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—The judgment-debtor under a mortgage-decree directing the sale of mortgaged properties has raised the question in controversy in two forms—in the form of a Civil Miscellaneous Appeal and in the form of a Civil Revision Petition. The main point relates to the duty of the executing Court with regard to the determination of the market value of the property ordered to be sold. The complaint before us was that the lower Court was wrong in not determining for itself the market value of the property for the purpose of the same being inserted in the proclamation of sale and further in directing that in the proclamation of sale the valuation of the property as stated both by the decree-holder and the judgment-debtor as well as that reported by the Commissioner appointed in the case should be set out without indicating any determination by the Court itself.

We shall later on refer to the argument that was specially addressed to us with regard to this manner of setting out in the proclamation of sale various estimates made by different parties or persons. Mr. K. S. Krishnaswami Aiyangar, the learned counsel for the appellant, assumed for the purpose of his argument that the Court executing the decree was bound to determine and set out in the proclamation of sale the valuation of the property as arrived at by itself. Our attention in this connection has been drawn to the judgment of their Lordships of the Judicial Committee of the Privy Council in the case of *Saadatmand Khan* v. *Phul Kuar*[1] and also to that decision having been

1. (1898) I.L.R. 20 All. 412: 25 I.A. 146 (P.C.).

Thiruvengadaswami Aiyangar v. Govindaswami Udayar.

Srinivasa Aiyangar, J.

regarded by many Courts in India as laying down such an obligation on the part of the Court. It seems to us impossible to regard the judgment of their Lordships as comprehending any such proposition. When their Lordships referred to the statements being made gratuitously either by the decree-holder or the Court, there can be no doubt that their Lordships did not consider that there was any obligation on the Court to fix any such value. It seems to us that what their Lordships decided in that case was merely that it is a material irregularity in the conduct of the sale, if it should be found that the market value of the property set out by the Court in the proclamation of sale should be grossly inadequate or incorrect. It is difficult to spell from the judgment of their Lordships a proposition that the Court is under any obligation to determine the market value of the property and set out the same in the proclamation of sale. It is one thing to say that if the Court should launch on the process of determining the market value and set it out for the information of the intending purchasers, it should do so correctly, and another thing to state that it is under any obligation at all to determine and fix the market value of the property. We do not see that the question was raised or discussed before their Lordships or that the decision can in any wise be regarded as one on this aspect of the question.

It may also be observed that in all the judgments in this country whenever a similar view seems to have been taken it was done without any argument or discussion. The question then has to be and indeed could be determined only with reference to the provisions in the Civil Procedure Code relating thereto. Sub-clause (*e*) of clause (2) of Rule 66 of Order 21 of the Code provides with respect to the proclamation of sale, that the proclamation shall specify as fairly and accurately as possible every other thing which the Court considers as material for a purchaser to know in order to judge of the nature and value of the property. No other clause or sub-clause in that rule has any reference either directly or indirectly to the value of the property. Sub-clause (*e*) is therefore the only clause which has to be looked at. When the legislature speaks of the purchaser judging of the nature and value of the property the implication is not unreasonable that the legislature could not have intended that the Court should do the judging for him. Again when the rule says "every other thing material for a purchaser to know in order to judge of the value," the indication seems to be clear that what the Court has to do is merely

Thiruvengadaswami Aiyangar v. Govindaswami Udayar.

Srinivasa Aiyangar, J.

to provide all the requisite material on which the intending purchaser might form his own judgment of the value of the property. When the direction therefore is that the Court in the proclamation should furnish the materials for judging the value, the inference would appear not to be unreasonable that the legislature does not require the Court to come to any judgment itself about the value. No doubt if in any case the Court should find and fix the value, such finding and fixing may itself be regarded as material on which the intending purchaser can form his own judgment. But even that can only be by some stretch of language. It would, therefore, seem to follow that the Court itself is under no obligation whatever to fix in the proclamation of sale its own valuation of the property to be sold. Our attention has also been drawn to an unreported judgment in Civil Miscellaneous Appeal No. 345 of 1926 in which the learned Judges have held, though without much discussion, that there was no obligation on the Court to fix and proclaim the value of the property to be sold. We agree entirely with that view. There can, however, be no doubt that if a Court sets out to find and fix the value of the property for being inserted in the proclamation of sale, it must be regarded as a judicial act more especially after the amendments that have been introduced in re enacting section 287 of the old Code as Rule 66 of Order 21. In the present case before us, however, the complaint is not that the Court fixed a wrong valuation, but being bound to fix a proper valuation it has not itself fixed any value but merely directed that in the proclamation reference should be made to the estimated value of the property as stated on one side by the decree-holder and on the other by the judgment-debtor and also as fixed by the Commissioner appointed in the case. As held in the case of *Arukapalli Narasimha Rao* v. *Arumilli Subbarayudu*,[2] while every order under Rule 66 of Order 21 will not amount to an order under section 47 of the Code, some orders may so come and in such a case, no doubt, there will be an appeal. The question, when some value has been fixed by the Court, what such value should be, may possibly be contended to be a question arising between the parties relating to the execution of the decree. The matter is not by any means free from difficulty but when the Court did not mean or purport to fix any value, it is impossible to say that any such question arises. Having regard therefore to the manner in which the lower Court has treated the matter, it cannot possibly be inferred that

2. (1926) 51 M.L.J. 135.

Thiruvengadaswami Aiyangar v. Govindaswami Udayar.

Srinivasa Aiyangar, J.

any question between the parties and relating to execution of decree has arisen so as to entitle the appellant to prefer the miscellaneous appeal.

The learned counsel for the appellant referred to some cases where it has been held that the Court is under a legal obligation to find and fix the actual market value of the property to be sold. The case of *Rajah Ramessur Proshad Narain Singh* v. *Rai Sham Krissen*[3] cannot be regarded as an authority for the position.

In *Munshi Raghunath Singh* v. *Hazari Sahu*[4] a special bench of the Patna High Court after holding that an order under Rule 66 of Order 21, Civil Procedure Code, settling the proclamation is a judicial order, state that in view of the decision of their Lordships of the Judicial Committee in the case of *Saadatmand Khan* v. *Phul Kuar*[1] it is not open to any Court in India to hold that it is not the duty of a Court preparing a proclamation to state as fairly and accurately as possible in the proclamation the value of the property. With all respect to the learned Judges it does not appear that the distinction was borne in mind between the obligation to fix the value accurately if any value is fixed and the obligation to fix any value at all. Further, the question in that case does not appear to have been considered on the terms of the rule. Chief Justice Chamier in that case held that the reference in the proclamation to the two estimates of Rs. 7,000 and 70,000 is more calculated to cause confusion in the minds of bidders than to be of any help to them in the matter. That may undoubtedly be so. The learned Chief Justice made that observation having regard to the great disparity between the two figures and the same observation would not obviously be applicable to a case where the disparity is not so great.

Further in the present case, in addition to the figures mentioned by the judgment-creditor which may be regarded as a sort of a minimum and that fixed by the judgment-debtor which may be regarded as a sort of maximum, there is also inserted the valuation fixed by the Commissioner. It is impossible to say that, having regard thereto, the figures set out are not helpful to intending bidders to form a judgment of their own regarding the value of the property.

---

1. (1898) I.L.R. 20 A. 412: 25 I.A. 146 (P.C.).
3 (1901) 8 C.W.N. 257. 4. (1917) 2 Pat. L.J. 130 (S.B.).

Thiruvengadaswami Aiyangar v. Govindaswami Udayar.

Srinivasa Aiyangar, J.

In *Rai Beni Prasad* v. *Edal Singh*[5] Chapman and Atkinson, JJ., held that the insertion in the sale proclamation of the value assessed by the decree-holder in addition to that fixed by the Court was calculated to mislead intending bidders and therefore wrong. It is possible to doubt the correctness of that view and in any case the decision there apparently proceeded on the view of the Full Bench of that Court in *Munshi Raghunath Singh* v. *Hasari Sahu*[4] above referred to. We are, therefore, unable to agree with the view that in all sale proclamations the Court is under an obligation under the terms of R. 66 of O. 21 to fix its own estimated market value of the property and that the mere setting out in the proclamation of the values fixed by the judgment-debtor and the decree-holder respectively is in all cases calculated merely to confuse intending bidders instead of being helpful to them and therefore offends against the principle of that rule.

Having regard to the fact that in this case the Commissioner's calculation has also been set out in the proclamation, the criticism based on the ground of possible confusion is not open. On the reason of the thing also, we are unable to see why it should be necessary for the Court to fix the valuation more especially when the reserve price is also generally fixed by the Court, and the price fetched at a sale often depends not on what may be called the intrinsic value of the property but on the demand for the property at the time of the sale.

The Civil Miscellaneous Appeal does not therefore lie and is not sustainable.

A Civil Revision Petition has also been filed by the same appellant as petitioner. Apparently that was done to provide against the contingency of the Court holding that no appeal lies. Even if the order did not come under section 47 of the Code we could no doubt have interfered, if there was some question of jurisdiction or some grievous blunder committed by the Court such as was held to be calculated to cause only confusion amongst bidders in the case of *Munshi Raghunath Singh* v. *Hasari Sahu*,[4] but in the view we have taken that the Court is under no legal obligation to ascertain and fix the market value of the property, no question of jurisdiction arises, and as already stated we are not satisfied that the figure stated in the proclamation, although of considerable disparity, cannot be helpful to the intending bidders. The Civil Revision Petition is therefore incompetent.

One last point also referred to by the learned counsel for the petitioner may be briefly disposed of. It was argued that there

4. (1917) 2 Pat. L.J. 130 (S.B.). 5. (1918) 4 Pat. L.J. 37.

Thiruvengadaswami Aiyangar v. Govindaswami Udayar.

Srinivasa Aiyangar, J.

was no notice given to the judgment-debtor before the lower Court ordered that in the place of the valuation originally given the various figures as now inserted should be set out. We find that the order was made on a date to which the matter stood adjourned by special order of Court. If the judgment-debtor did not choose to be present on the occasion, it was his own fault.

Further, we are not satisfied that the order made by the Court in the circumstances was wrong so as to justify the interference of this Court on revision.

Both the Civil Miscellaneous Appeal and the Civil Revision Petition are, therefore, dismissed with costs.

A.S.V. *Both Appeal and Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE SRINIVASA AIYANGAR.

Andi Thevan .. *Appellant** (*3rd deft.*)

v.

Nagayasami Chettiar and another .. *Respondents* (*Plffs.*).

Andi Thevan v. Nagayasami Chettiar.

Mortgage—Keeping alive—Intention express or capable of being directly inferred—Necessity—Subrogation—Attached property—Mortgage of—Mortgagee paying off prior mortgage on property—Right to be subrogated to rights of prior mortgagee—Conditions—Notice of subsequent incumbrance—Necessity—Partial discharge of prior mortgage—Meaning of.

The intention to keep alive a mortgage need not always be express or even capable of being directly inferred.

Pending an attachment of property in execution of a money decree, the judgment-debtor executed a mortgage thereof. With the moneys advanced by the mortgagee under the said mortgage, a prior mortgage on the property was discharged. The payment and discharge of the prior mortgage was not in pursuance of any agreement between the mortgagor and the mortgagee for the payment and discharge of the prior mortgage. The payment thereof was, however, recited in the mortgage deed to be one of the items of consideration therefor, and there was also a covenant in the mortgage deed that the mortgagee should obtain under the deed a first mortgage over the mortgaged property.

Held, that the mortgagee was entitled, as against the purchaser at the sale held in execution of the money decree, to be subrogated to the right, title and interest of the prior mortgagee.

To entitle a person who pays off a prior incumbrance to claim subrogation, it is not necessary that he should have had notice of the intermediate encumbrance or obstacle having regard to which the question arises.

---

*S.A. No. 509 of 1925. 2nd December, 1927.

Andi Thevan v. Nagayasami Chettiar.

Semble: Where a prior incumbrance is wholly paid off and discharged, though partly with money advanced by a subsequent mortgagee and partly with money of the mortgagor, the discharge thereof cannot be held to be a partial discharge within the meaning of the rule disentitling the subsequent mortgagee to subrogation in such a case.

Second appeal against the decree of the Court of the Additional Subordinate Judge of Ramnad at Madura in A.S. No. 36 of 1924 preferred against the decree of the Court of the Principal District Munsif of Srivilliputtur in O.S. No. 158 of 1922.

S. Narayana Aiyangar for appellant.

K. V. Sesha Aiyangar for 1st respondent.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—This second appeal arises from a suit instituted by the respondents before us, as plaintiffs, on a deed of mortgage. It was an ordinary suit for sale of the mortgage security. In the defence raised on behalf of the 3rd defendant who was the auction-purchaser of one item and part of another item covered by the suit mortgage, it was contended that in execution of a money decree obtained against the 1st defendant an attachment had been effected of the suit items and that the suit mortgage was made at a time when such attachment was in force and that as the 3rd defendant purchased the suit items at the sale held in pursuance of such attachment the suit mortgage could not prevail against the purchaser. On these facts the further and the only question that arose was whether the plaintiffs would be entitled to be subrogated to the right, title and interest of a previous mortgage of the said items whose mortgage was paid off with the moneys advanced by the plaintiffs on the suit mortgage. The Lower Appellate Court having held that the plaintiffs were so entitled gave a mortgage-decree in favour of the plaintiffs for the sum of Rs. 200 with interest thereon. The present appeal is by the 3rd defendant.

The learned vakil for the appellant has argued at considerable length before us taking two points. The first point may be briefly referred to and disposed of and that was that the plaintiffs' suit as it was originally laid was a simple suit on a mortgage. There was no reference in the plaint whatsoever to the previous encumbrance or the discharge of it, much less to any rights of subrogation claimed by the plaintiffs. In these circumstances it was argued by the learned vakil for the appellant, 3rd defend-

ant, relying upon *Mohesh Lal* v. *Mohant Bawan Das*[1] and *Maharaj Singh* v. *Balwant Singh*[2] that the plaintiffs having failed to plead their rights as on subrogation are not entitled to recover on that footing. It must also be observed that after the defence was raised on the ground of the attachment no application for amendment of the plaint was made on behalf of the plaintiffs. But it is clear, as pointed out by the learned vakil for the 1st respondent, that the matter was treated in both the Lower Courts as one only for the determination of this question of subrogation. This particular objection on the ground of pleading does not appear to have been taken either in the trial Court or in the Lower Appellate Court. It has not been taken specifically even in the grounds of appeal to this Court. If the point had been taken, it might have been open to the plaintiffs to ask for a formal amendment of the plaint. But when we see that the point was not taken on behalf of the defendant-appellant and substantially both the Lower Courts have dealt with the question as though a direct issue was raised in respect of it, we are not satisfied that it would be in the interests of justice to non-suit the plaintiffs on the mere ground that the plaint did not contain any averments with regard to it.

The next question that was argued was that the Lower Appellate Court was wrong in holding that the plaintiffs were entitled to be subrogated to the right, title and interest of the prior mortgagee. The facts of this case are very similar to the facts of the case reported in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*.[3] In that case also there was an attachment before judgment and their Lordships held that as the previous mortgage was paid off and discharged with the moneys advanced by the plaintiff-mortgagee and, as the intention was also clear that he paid off the previous mortgage not for the purpose of extinguishing it, it must be assumed that he must have intended to keep it alive because it was clearly to his advantage to do so. The only distinction between that case and the present one that was emphasized and argued before us was that in that case payment and discharge of the prior mortgage is stated to have been pursuant to an agreement entered into between the mortgagor and the mortgagee that with the moneys being advanced the prior mortgage should be discharged. In the present case though the language of the document, Ex. A, is not very clear, still we find

1. (1883) I.L.R. 9 C. 961: 10 I.A. 62 (P.C.).
2. (1906) I.L.R. 28 A. 508.
3. (1901) I.L.R. 29 C. 154: 29 I.A. 9: 12 M.L.J. 73 (P.C.).

Andi Thevan v. Nagayasami Chettiar.

Srinivasa Aiyangar, J.

that in a portion of the document, which has not been translated, there is reference to the particulars of the receipt of consideration and one of the items of consideration so particularised is payment in discharge of the prior mortgage. The reference to the prior mortgage is not merely indicative of the purpose for which the mortgagor was borrowing under the mortgage, but it is clear that the reference to it as part of the consideration carries and involves an implied obligation on the part of the mortgagor who was borrowing the money to pay off and discharge the prior encumbrance. There is also no doubt that, as in the case in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*[3] in the present case there is also a covenant in the deed of mortgage that the mortgagee should obtain under the suit instrument a first mortgage over the properties. If that was the intention between the contracting parties, an implied obligation on the part of the mortgagee to pay off and discharge the prior mortgage would undoubtedly have to be inferred. On principle therefore the present case is not really distinguishable from the case in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi*.[3] A great deal of argument was addressed by the learned vakil for the appellant for the purpose of showing that it is incumbent on the party claiming rights of subrogation to make out affirmatively that there was the intention on his part to keep alive the prior mortgage that is paid off and discharged. To such a proposition so largely stated we cannot possibly accede. In the leading case on the subject of subrogation in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*[4] their Lordships of the Judicial Committee speak of the intention being ascribed. A similar expression occurs in many other cases that deal with the subject. From such an expression it is clear that the intention need not always be express or even capable of being directly inferred. It is clear also that their Lordships of the Judicial Committee in the case in *Gokaldas Gopaldas* v. *Puranmal Premsukhdas*[4] clearly put it as a question of justice, equity and good conscience. It was also contended by the learned vakil for the appellant that the person who pays off the prior encumbrance and claims subrogation must have had notice of the intermediate encumbrance or obstacle having regard to which the question arises. On the decided cases it seems to us that no such principle can possibly be postulated. If the real question should be one of justice, equity and good conscience, the principle cannot be that it is only

3. (1901) I.L.R. 29 C. 154: 29 I.A. 9: 12 M.L.J. 73 (P.C.).
4. (1884) I.L.R. 10 C. 1035: 11 I.A. 126 (P.C.).

when the party has notice of the obstacle or intermediate encumbrance that relief can be given to him. On the other hand it would seem that it is only when a person acts *bona fide* in ignorance that he can be said to be in greater need of equitable relief. In the present case, if the plaintiff-mortgagee had been aware of the real state of facts, namely, the attachment order that had been issued by the Court there would have been no doubt whatever that he would have expressly stipulated for the previous encumbrance being kept alive for his benefit. In these circumstances, it is difficult to say why such an intention should not necessarily be ascribed to him even if it should be equitable to do so. We have, therefore, come to the conclusion that on the main features the case is not distinguishable from the case in *Dinobundhu Shaw Chowdhry* v. *Jogmaya Dasi.*[3] In the result we agree with the Lower Appellate Court with regard to this question of subrogation.

Two other questions were also raised by the learned vakil for the appellant. It was contended that the discharge of the prior encumbrance was only a partial discharge. There is no foundation for such an argument. It has not been shown that at the time when Rs. 200 was paid in respect of the prior encumbrance there was any balance left over and unpaid. The expression "partial discharge" would have no meaning or significance otherwise. If, therefore, at the time of making the payment of Rs. 200 for the purpose of discharging the previous encumbrance the mortgagor paid to the prior encumbrancer from his own pocket all the interest due and from the amount of the mortgage paid the balance, namely, the principal amount, there is no reason why such discharge should be regarded only as a partial discharge even when it admittedly resulted in a complete discharge of the prior encumbrance. Further, this point also does not appear to have been taken at any earlier stage.

Lastly it was argued that in any case the 3rd defendant-appellant would be entitled to an order that the plaintiff-respondents should be directed to proceed in execution of the mortgage decree in the first instance only in respect of items of plaint properties not purchased by the 3rd defendant. That is undoubtedly an equitable order to which the appellant may be entitled and it is not opposed. We, therefore, direct that the decree passed by the Lower Appellate Court be modified by directing that the suit properties not claimed by the 3rd defendant be sold in the first

3. (1901) I.L.R. 29 C. 154: 29 I.A. 9: 12 M.L.J. 73 (P.C.).

Andi Thevan v. Nagayasami Chettiar. — Srinivasa Aiyangar, J.

instance, and the properties in which the 3rd defendant is interested be sold only if there should still be a deficiency in the amount due. As we are satisfied that the respondents are really to blame in not having referred to and relied upon the subrogation in their plaint and having regard to the fact that the appellant has in any case obtained some relief before us, the proper order for costs would be that each party in this second appeal do bear his own costs.

A.S.V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SRINIVASA AIYANGAR AND MR. JUSTICE ANANTAKRISHNA AIYAR.

Lanka Sanyasi .. *Appellant** (1*st Deft.*)

v.

Lanka Yerran Naidu (dead) and others .. *Respondents* (*Plffs.*).

Lanka Sanyasi v. Lanka Yerran Naidu.

Decree—Minor defendant attaining majority during pendency of suit—Decree in suit against, without fact of his attaining majority being brought to notice of Court—Validity of, against minor—Decree based on adjudication on merits—Decree based on compromise entered into by his guardian ad litem—*Distinction.*

Where a defendant, who was a minor at the time of the commencement of the suit, attains majority during its pendency, but is allowed to continue to appear on the record as a minor and his guardian *ad litem* is not discharged, the decree passed in the suit as the result of an adjudication by the Court on the merits is nevertheless binding on him. This principle is, however, inapplicable to a case in which the decree is one based upon a compromise entered into by the guardian *ad litem* on behalf of that defendant on the footing that he was a minor at the time. The fact that the compromise was sanctioned by the Court as being for the benefit of that defendant does not make the decree passed on foot thereof valid and binding on him.

Second appeal against the decree of the Court of the Subordinate Judge of Vizagapatam in A.S. No. 32 of 1923 preferred against the decree of the Court of the Additional District Munsif of Vizianagram in O.S. No. 519 of 1921.

R. Ramamurthi and *K. Kameswara Rao* for appellant.

B. Jagannadha Doss for respondents.

The Court delivered the following

JUDGMENT.—This second appeal has arisen from a suit which was instituted by two plaintiffs for a declaration that a

---

*S.A. No. 358 of 1924. 30th September, 1927.

Lanka Sanyasi v. Lanka Yerran Naidu.

decree passed against them in O.S. No. 461 of 1918 on the file of the District Munsif's Court at Parvathipur was not binding on them and also for possession of the property which under that decree appears to have been obtained by the 1st defendant in this litigation who was the decree-holder in the previous suit. In the District Munsif's Court the plaintiffs' suit was dismissed, but in the Lower Appellate Court the learned Subordinate Judge having arrived at the finding that the 1st plaintiff at least was a major on the date of the compromise on which the decree was passed held that the decree was not binding on both the plaintiffs and therefore granted a decree in favour of both the plaintiffs declaring that the previous decree was not binding on them and also for delivery of possession of the property. It has been argued by the learned vakil for the appellant before us that, even on the ground on which the Lower Appellate Court held that the previous decree was not binding on the plaintiffs, namely, that the 1st plaintiff at least was a major, the Lower Appellate Court was wrong in considering that a decree passed against persons who are on the record as minors in the belief that they continued up to the time of the decree as minors would not be binding on them. For this purpose the learned vakil for the appellant referred to the decision of Sadasiva Aiyar and Napier, JJ., in the case of *Seshagiri Rao* v. *Hanumantha Rao*.[1] In that case the learned Judges have clearly pointed out that there are no provisions in the Civil Procedure Code relating to suits by and against minors obliging a plaintiff to apply for discharge of the guardian *ad litem* of a defendant who had ceased to be a minor. There are provisions in the Civil Procedure Code for a minor plaintiff on attaining majority electing to go on or not to go on with a litigation. That is obviously in view of the fact that the plaintiff is in a position to elect either to go on or not to go on with a litigation to which he is a party because he is *dominus litus*. No such consideration is available in respect of the defendant. A defendant having been made a party-defendant to the action may no doubt confess judgment but has no such right of election as the plaintiff has. That is probably the reason why no provisions have been made in the Civil Procedure Code in respect of a minor defendant attaining majority. Apparently, therefore, we must take it as found by the learned Judges in that case, that the minor defendant who comes of age may, if he thinks fit, come on the record and conduct the defence himself. If, however, he does not do so and allows the case to

1. (1915) I.L.R. 39 M. 1031.

Lanka Sanyasi v. Lanka Yerran Naidu.

proceed as though he was still a minor without bringing to the notice of the Court the fact of his having attained majority, then he must be deemed to have elected to abide by the judgment or adjudication by the Court with respect to the matters in controversy on the basis of the suit at the time. That is how the learned Judges came to the conclusion in that case that a judgment given by a competent Court against a defendant, albeit a defendant who had during the pendency of the suit attained majority having ceased to be a minor, is not a nullity. That view is based on sound principle. But the difficulty in this case has arisen from a contention that was put forward by Mr. Jagannadha Doss on behalf of the respondent who drew our attention to the judgment of the same learned Judges on an application for review made to them in that very case. The judgment on review by the learned Judges is reported in *Tanguturi Jagannadham* v. *Seshagiri Rao.*[2] At first sight it appeared as though on this decision the learned Judges came to the conclusion that because they discovered that the application to set aside the sale of the property sold in execution was within time they regarded the judgment itself as either voidable or avoided. But on a closer examination of the case there seems to be no doubt whatever that what the learned Judges did on review was merely to set aside the sale treating it as a separate proceeding and because in respect of that proceeding there was no proper notice served on the party who had by that time become a major. As we respectfully agree with the decision of the learned Judges in *Seshagiri Rao* v. *Hanumantha Rao*[1] and also with another judgment of this Court in the case of *Sundararama Reddi* v. *Pattabhirama Reddi,*[3] it follows that the mere circumstances that a minor defendant had attained majority during the pendency of the suit and has not elected to continue the defence himself is not sufficient to enable him to have declared as not binding on him the judgment duly pronounced by the Court. If that were all there would be very little further difficulty in this case. But it turns out that the decree sought to be set aside was not the result of the adjudication by the Court of the matters in controversy in the previous suit between the parties. The ultimate judgment of the Court was based on a compromise. That compromise was entered into by the plaintiffs in the previous suit and by the second defendant in this suit acting both for himself and on behalf of his younger brothers, the plaintiffs in

1. (1915) I.L.R. 39 M. 1031. 2. (1916) 20 M.L.T. 479.
3. (1917) 6 L.W. 272.

Lanka Sanyasi v. Lanka Yerran Naidu.

this litigation. Whatever may be the principles that are applicable to the binding nature of an adjudication by the Court on a defendant who though he becomes a major does not take the necessary steps to have the guardian *ad litem* discharged, it seems to us that no such considerations are available or applicable to a case where the decree of Court comes to be passed not on adjudication by the Judges but by a compromise on a contract or consent of the parties. It stands to reason and principle that an adjudication by the Court which, we may take it, in the absence of any fraud, collusion or gross negligence is an adjudication on the merits of the controversy, need not be set aside as vitiated merely because a certain defendant is found to have attained his majority without the matter being brought to the notice of the Court. But when the decree comes to be passed on a contract it becomes necessary to see whether the contract that was entered into was a contract valid and binding on the party now seeking to set aside the decree. So far, if the plaintiffs had both of them been found to be minors on the date of the compromise, then there is the fact that the second defendant in this suit representing them as their guardian *ad litem* entered into such a contract and such contract was sanctioned on behalf of the minor defendants by the Court as being for their benefit. But the law says that such a compromise is binding on a minor if sanctioned by the Court. But when the law says that such a compromise is binding on a minor when the Court sanctions it, what the law has reference to is a contract made only for or on behalf of a minor and there could be no legal principle or reason for holding that when there is a major capable of entering into a contract apart from any question of agency any contract entered into or purported to be entered into on his behalf by some other person can be regarded as binding on him. If, therefore, the first plaintiff in this suit had become a major by the time the compromise agreement was entered into it follows that the mere circumstances that the second defendant here was his guardian *ad litem* or had been previously acting as his guardian *ad litem* would not clothe him with the required legal right to enter into a binding contract. There is no provision or principle of the law of contracts which would make such a contract entered into by a previous guardian *ad litem* binding on a party defendant who had become a major. It, therefore, follows that, so far as the first plaintiff in this case is concerned who has been found by the Lower Appellate Court to have attained majority on the date of the compromise and decree, the Lower

Lanka Sanyasi v. Lanka Yerran Naidu.

Appellate Court was right in the conclusion arrived at that the decree was not binding on him, though the grounds on which it came to that conclusion were different. So far as the second defendant is concerned, the Lower Appellate Court has not recorded any finding with regard to his age. The contention on behalf of the plaintiffs in both the Lower Courts has been that both of them had attained majority on the date of the compromise and decree or even on the date of the previous suit itself. The Lower Appellate Court has not recorded any finding because in its view it was unnecessary to enquire into the matter in the view it took of the decree being one and single and of its not being binding on at any rate one of the plaintiffs. Deeming this sufficient, regarding the decree as one and single the Lower Appellate Court did not record any finding with regard to the actual age of the second plaintiff. But in the view we have taken of the matter it becomes necessary to consider the actual age of the second plaintiff because if the decree as held by us was ultimately based on contract or consent, the capacity or the power of the second defendant in this case to enter into a valid contract on behalf of the second plaintiff can only be determined by seeing whether as a matter of fact the second plaintiff was on the date of the compromise a minor as he was purported to be. There are also, as Mr. Jagannadha Doss has pointed out, other issues that have not been determined by the Lower Appellate Court and which it would be necessary to decide if the Lower Appellate Court should come to the conclusion that the second plaintiff was a minor. If, of course, the finding of the Lower Appellate Court should be that he too had attained majority and become a major the same considerations will apply to him as to the first plaintiff and it must be held that the contract entered into at that time on his behalf would not be binding; but if he should be found to have been a minor, then the other questions raised, such as whether there was collusion between his guardian and the plaintiff in the previous suit or whether the guardian *ad litem* acted with gross negligence as charged might all have to be tried and determined. It therefore follows that so far as the first plaintiff is concerned the decree of the Lower Appellate Court will stand confirmed. So far as the second plaintiff is concerned, the judgment and decree of the Lower Appellate Court are reversed and the case will be remanded to the Lower Appellate Court for disposal having regard to all the points indicated above. As the decree passed in the previous suit against the first plaintiff has been de-

clared not to be binding on him by the Lower Appellate Court and that decree has now been confirmed by us, it follows that so far as he is concerned the first defendant-appellant will be entitled, if so advised, to require that the previous suit be re-opened and adjudicated in accordance with law as against the first plaintiff. The costs of this appeal will be reserved and disposed of by the Lower Appellate Court.

A.S.V. *Case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

B. Raja Rajeswara Sethupathi *alias* Muthu-ramalinga Sethupathi .. *Appellant** (*Deft.*)

v.

Muthudayana Pillai .. *Respondent* (*Plff.*).

Madras Estates Land Act (I of 1908), Ss. 189, 57, 55—Suit by ryot in Revenue Court under S. 55 of Act—Dismissal of, on ground that he was not entitled to demand a patta—Subsequent suit by him in Civil Court for possession of same land—Maintainability.

The plaintiff instituted a suit in a Revenue Court under S. 55 of the Madras Estates Land Act in respect of the plaint land, but that suit was dismissed on the ground that he was not entitled to demand a patta. He subsequently instituted a suit in the Civil Court to obtain possession of the suit land.

Held, that the decision in the prior suit in the Revenue Court was, under S. 189 (3) of the Estates Land Act, *res judicata* in the subsequent civil suit.

A suit for the grant of a patta lies within the jurisdiction of the Revenue Courts and cannot be brought in a Civil Court under S. 189 (1) of the Estates Land Act; and, under S. 57 of that Act, the Revenue Court is bound to decide in the first place whether the party sued is bound to grant or accept a patta. The question as to the occupancy right of the plaintiff in the prior suit was, therefore, one within the exclusive jurisdiction of the Revenue Court within the meaning of S. 189 (3) of the Estates Land Act.

Second appeal against the decree of the Court of the Sub-ordinate Judge of Ramnad at Madura in A.S. No. 61 of 1922 (A.S. No. 64 of 1922 on the file of the District Court of Ramnad at Madura) preferred against the decree of the Court of the District Munsif of Paramakudi in O.S. No. 155 of 1920 (O.S. No. 820 of 1919 on the file of the Court of the District Munsif of Devakottai).

---

*S.A. No. 616 of 1925. 3rd May, 1928.

Raja Rajeswara Sethupathi v. Muthudayana Pillai.

S. Varadachariar and *S. Sundararaja Aiyangar* for appellant.

K. Bhashyam Aiyangar and *R. Narasimhachariar* for respondent.

The Court delivered the following

Phillips, J.

JUDGMENT. *Phillips, J.*—In this case the plaintiff (respondent) instituted a suit in a Revenue Court under section 55 of the Estates Land Act. His suit in respect of the plaint land was dismissed on the ground that he was not entitled to demand a patta. He has brought the present suit to obtain possession of the suit land, and the question that now arises for decision is whether the decision in the prior suit in the Revenue Court is *res judicata* or not. The section applicable is section 189 (3) of the Estates Land Act. It says:

"The decision of a Revenue Court or of an appellate or revisional authority in any suit or proceeding under this Act on a matter falling within the exclusive jurisdiction of the Revenue Court shall be binding on the parties thereto and persons claiming under them in any suit or proceeding in a Civil Court in which such matter may be in issue between them."

This question has been considered in several cases, but in most of these cases the circumstances were not the same as here. In *Ramadina Das Gosayiji Garu* v. *Boishamo Mundalo*[1] and Second Appeals Nos. 1002 and 1213 of 1916 on the file of the High Court the prior litigation in the Revenue Court had been in respect of commutation of rent and it was held in a subsequent suit in a Civil Court that the decision as to title in the Revenue Court did not constitute *res judicata* as it was a decision on a matter which did not fall within the exclusive jurisdiction of the Revenue Court. Second Appeal No. 786 of 1919 on the file of the High Court was concerned with the decision in a suit for rent for a particular fasli and the same view was held. In all these cases it is clear that the question decided in the Revenue Court was not one falling within its exclusive jurisdiction so far as those suits were concerned. There is, however, a decision in *Appa Rao* v. *Gurraju*[2] in which the facts are very similar to the present; the suit in the Revenue Court in that case being one under section 58 of the Estates Land Act for enforcing a patta, and it was there held that the decision of the Revenue Court on the title to the land or occupancy rights was not *res judicata* in a subsequent suit in a Civil Court.

1. (1921) 14 L.W. 251.

2. (1920) I.L.R. 43 M. 859: 39 M.L.J. 476.

Held, that Act I of 1926 being a declaratory Act and not a repealing and amending Act, and a right to apply for attachment being a processual right, the usual presumption that an Act is not retrospective did not apply, and that, the Act being retrospective in its operation, the attachment order by the Small Cause Court was void.

Petition under section 115 of Act V of 1908 praying the High Court to revise the order of the District Court of East Tanjore at Negapatam, dated 27th September, 1927 in A.S. No. 34 of 1927 preferred against the order of the Court of the District Munsif of Shiyali in E.P. No. 565 of 1926 in S.C.S. No. 1099 of 1925 on the file of the Court of the Subordinate Judge of Mayavaram.

The following are the facts:—

The plaintiff obtained a decree against the defendants in a Small Cause suit in the Sub-Court of Mayavaram on 30th March, 1926, 2nd defendant being sued as surety for 1st defendant. An application for attachment before judgment of the immoveable property belonging to the 2nd defendant was made and interim attachment was ordered on 15th January, 1926 and actually effected on 21st January, 1926. The attachment was made absolute on 30th March, 1926 when the decree was passed and after the death of the 2nd defendant his undivided brothers 3rd and 4th defendants were impleaded as his legal representatives. The decree was transferred to the District Munsif's Court of Shiyali for execution. Plaintiff applied for sale of properties attached. Defendants 3 and 4 contended that the order, dated 30th March, 1926 making the attachment absolute was void by means of Act I of 1926 having come into force whereby a Small Cause Court was deprived of the power to attach immoveable property before judgment and that they, on the death of the 2nd defendant, became entitled by survivorship to the immoveable property in question. The District Munsif held that the Act I of 1926 applied to all proceedings pending in the Courts dealt with by the Act on the date it came into force and therefore the attachment was void and rejected the application. On appeal, the District Judge of East Tanjore held that Act I of 1926 was not retrospective and that the Court had jurisdiction to make the interim order of attachment absolute, and reversed the order of the District Munsif. Defendants 3 and 4 preferred a Civil Revision Petition to the High Court.

C. A. Seshagiri Sastri for petitioners.

C. V. Athmanathan for respondent.

The Court delivered the following

JUDGMENT:—In my opinion the Court of first instance is clearly right in its view of the law. An interim order of attachment of 2nd defendant's immoveable property before judgment

was passed on 15th January, 1926 and the attachment was made absolute when the decree was passed on 30th March, 1926. Meanwhile, Act I of 1926 had come into force on 24th February, 1926. This was an explanatory Act passed with reference to the conflicting views which had been taken as to the power of a Small Cause Court to attach immoveable properties before judgment. By that Act, to Order 38, Rule 12 of the Code of Civil Procedure was added another Rule 13 declaring that Small Cause Court had no such powers. There is no dispute, therefore, that when the attachment order in this case was made absolute on 30th March, 1926, it was an order beyond the powers of the Court to pass.

Act I of 1926 being a declaratory Act, the usual presumption that an Act is not retrospective does not apply (vide *Attorney-General* v. *Dussley*[1]) *vide* also *Mohammadi Bibi* v. *Kashi Upadhya*.[2] Moreover, even otherwise a right to apply for attachment is, I agree with the learned District Munsif, a processual right, and, as he puts it, a privilege whose exercise depends entirely on the discretion of the Court.

The learned Appellate Judge has, in my opinion, taken a wrong view in saying that Act I of 1926 took away any jurisdiction which the Small Cause Court had before. There is absolutely nothing repealed by the Act. As a new rule had to be added to resolve the disputed point, it had of course to be called an amending Act as well as an explanatory Act. I disagree with the views expressed in paragraph 8 of his judgment that "the power possessed by a Court to order attachment before judgment was expressly taken away and repealed" and that "Act I of 1926 is a repealing Act as well as an amending Act."

The Madras High Court had no doubt held in *Kothandarama Chettiar* v. *Annamalai Pillai*[3] that a Small Cause Court had such powers. There had been conflicting decisions in the Calcutta High Court and finally it was held by a Full Bench there that while a Small Cause Court could pass the order for attachment, it could not execute it. To declare the law on the point, Act I of 1926 was passed. Its effect is that the view taken in *Kothandarama Chettiar* v. *Annamalai Pillai*[3] was bad in law. To argue that such a view created rights is not permissible. A Court does not create rights by such a decision but

1. Craies on Statute Law, p. 336, 3rd Ed.
2. (1926) 96 I.C. 775.
3. (1924) I.L.R. 48 M. 488: 48 M.L.J. 406.

merely states its view as to the rights possessed by persons or Courts. *Vedavalli Narasiah* v. *Mangamma*[4] quoted for respondent has no application to a case like this and in fact is against him in so far as it lays down that Acts relating to procedure are retrospective.

The petition must be allowed with costs. The order of the Appellate Court is set aside and that of the Original Court restored.

N.S. *Civil Revision Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT :—MR. JUSTICE BEASLEY.

Watrap S. Subramania Aiyar, High Court Vakil and others .. *Plaintiffs**

v.

The United India Life Insurance Company Limited, Madras, a company carrying on business of Life Insurance at No. 10, Maclean Street, G. T., Madras and others .. *Defendants.*

Company—Director of, excluded from acting as such by other directors of company—Suit in his own name by, against directors who excluded him—Right of—Insurance Company—Articles of Association of—Construction—Policy-holders' meeting for election of Policy-holders' Directors—Adjournment of—Prohibition of—What amounts to—Adjournment of, for a bona fide *purpose—What amounts to—Validity of—Common Law right of every meeting to adjourn itself—Meeting to be held at company's office—Provision as to—Non-compliance with—Effect—First meeting held at company's office but adjourned meeting held elsewhere—Effect—Objection to meeting on ground of its not being held in company's office—If available to company and directors—Company and directors preventing meeting from being held in company's office—Effect—Party cannot take advantage of his own wrong—Application of principle of—Adjourned meeting same meeting but a continuation of it—Proxies registered for original meeting if available for adjourned meeting—*Bona fide *in fact—*Bona fide *in law—No distinction between.*

In a case in which the Articles of Association of an Insurance Company provided for the election or appointment of two directors by the policy-holders of the company, the directors so elected or appointed to be known as "Policy-holders' Directors", two persons, alleging themselves to have been validly elected "Policy-holders' Directors", sued the company and its

---

*C.S. No 258 of 1928. 14th September, 1928.

4. (1903) I.L.R. 27 M. 538.

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

directors for (1) a declaration of the validity of their election as such directors and of their right to act as such, and (2) an injunction restraining the other directors from interfering with their right to act as such directors. On objection taken by the defendants that individually the plaintiffs had no cause of action and that the suit should have been instituted by the policy-holders as a body, *held,* overruling the objection, that the plaintiffs alone could maintain the suit and that no other policy-holders could on their behalf have maintained it, and that the Directors of the Company had properly been impleaded as defendants

A director who has been excluded from acting as a director by the directors of a company can sustain an action in his own name on the ground of individual injury to himself and the action can be sustained against the other directors.

The Articles of Association of an Insurance Company relating to the holding of the ordinary general meeting of the share-holders of the company expressly autherized an adjournment thereof; while those relating to the holding of a meeting by the policy-holders for the election or appointment of Policy-holders' Directors contained no such provision.

Held, that it was not a necessary inference that an adjournment of the policy-holders' meeting was prohibited by the Articles of Association of the Company.

Held, further, that it being a common law right in every meeting to adjourn itself unless an adjournment is prohibited by express enactment, the Policy-holders' Meeting convened for the purpose of electing or appointing "Policy-holders' Directors" had a right to adjourn itself for a *bona fide* purpose *Held also* that an adjournment of such a meeting for the sole purpose of getting a better representation of policy-holders at the adjourned meeting was an adjournment for a *bona fide* purpose.

No distinction can be made between *bona fide* in fact and *bona fide* in law. There is no such thing as constructive *mala fides.*

An adjourned meeting is the same meeting but a continuation of it and proxies registered for the original meeting are good for the adjourned meeting.

A person who has deliberately brought about a state of affairs cannot be allowed to take exception to that state of affairs and use that changed state for his own advantage.

Where the Articles of Association of an Insurance Company relating to the election or appointment of directors by the policy-holders provided that the meeting at which the election or appointment was to be made was to be held in the company's office, *held* (1) that the provision was not an essential one, and that no objection could be taken to a meeting properly convened and regularly conducted on the ground that it was not held in the company's office, (2) that, in any event, the provision would be sufficiently complied with by the first meeting being held there, it being permissible in such a case to hold an adjourned meeting at any other place, (3) that the objection to a meeting on the ground that it was not held in the company's office was one available to the policy-holders and not to the directors, and (4) that the company and directors who had prevented a meeting from being held in the company's office and caused its being held elsewhere could, in no event, take the objection that it was not held in the Company's Office.

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

C.S. No. 258 *of* 1928. The facts are fully stated in the judgment.

K. Narasimha Aiyar, A. Krishnaswami Aiyar, S. Panchapagesa Sastri and *N. Rajagopala Aiyangar* for plaintiffs.—The action is well constituted. The policy-holders as a body have no right to sue. The only persons that can sue for the reliefs claimed in the plaint are the plaintiffs. The plaintiffs are entitled to institute the suit, and no one else has the right to do so. The plaintiffs are complaining against an individual wrong done to them by the Directors individually and hence the Director-defendants are proper parties. *See* per Jessel, M. R., in *Pulbrook* v. *Richmond Consolidated Mining Co.*,[1] *Munster* v. *Cammel Company*,[2] Buckley on Companies, 10th edition, page 621 and *see* also the frame of the suit in *Spencer* v. *Kennedy*[3] and in *McLaren* v. *Thompson.*[4]

Every meeting has the inherent power to adjourn itself. In *R.* v. *D'Oyly*[5] the question was mooted whether the power to adjourn, inherent in the meeting, vested in it or in the Chairman as incidental to his power of conducting the meeting. The adjournment in the case was merely for the purpose of a poll. *Stoughton* v. *Reynolds.*[6] Lord Hardwicke, C. J., said:

"In whom is the power of adjournment, in the vicar or in the parishioners—it is the assembly itself where all are equal." *R.* v. *Carmarthen.*[7]

Every meeting must of necessity have the power to adjourn. *See* also *Scadding* v. *Lorant*,[8] *Kerr* v. *Wilkie*,[9] Buckley on Companies, p. 615 and Dillon on Corporations, pp. 832, 864 and 867.

There is a presumption that meetings of a Corporation are regularly held, and that all proceedings therein are regularly had and this presumption applies also to the motion for adjournment and to the proceedings of the adjourned meeting. Dillon on Corporations, p. 870.

The adjourned meeting is in law the continuation of the original meeting. *Scadding* v. *Lorant*[8] and *Maclaren* v. *Thompson.*[10]

The policy-holders assembled at the first meeting had not chosen not to elect Directors by reason of their adjourning the meeting. Rather they evinced their choice to go on with the

1 (1878) 9 Ch D 610.
2. (1882) 21 Ch D. 183 at 186.
3 (1926) 1 Ch 125 at 130.
4. (1917) 2 Ch. 41.
5. (1840) 12 Ad & El. 139: 113 E R 762.
6 (1736) 95 E R. 176: 2 Str. 1045:
7. (1815) 1 Maule and Selwyn 697 at 702.
8 (1851) 3 H.L.C 418.
9. (1860) 6 Jur. N S. 383 : 119 R R. 1019.
10. (1917) 2 Ch. 261 (C.A.)

election by such act. Hence the Directors were wrong in their view that the policy-holders had forfeited their rights.

S. Doraiswami Aiyar and *K. S. Rajagopala Aiyangar* for defendant company and *A. K. Ramachandra Aiyar* for some of the Directors.

S. Doraiswami Aiyar.—The plaintiffs must prove that they were properly elected Directors of the Company before they can have the declaration or injunction. The validity of the plaintiffs' election depends upon (1) The regularity of the proceedings and the resolutions at the first meeting on the 21st April, and (2) the regularity of the so-called adjourned meeting held on the 5th May. Policy-holders are strangers to the company and their right to be represented on the Directorate must be clearly made out under the articles. The meeting at which the election of Policy-holders' Directors has to take place under Art. 73 has (1) to be convened by the Directors. (2) The meeting must be held at the office of the Company. (3) The date and hour of such meeting has to be fixed by the Directors. (4) Such meeting has to be held within 15 days of the General Meeting of the Company. Not one of these conditions were satisfied by the meeting which purported to elect the plaintiffs. There is in law no inherent power in any meeting to adjourn itself. Even if there is any such right, at law, it has been negatived by the articles. The meeting at which the Directors have to be elected must be held within 15 days of the General Body Meeting. Under Art. 77 if at a meeting the Directors are not elected for any reason, the rights of the policy-holders cease. Again compare the articles dealing with the meetings of share-holders and those dealing with policy-holders—in the former a right to adjourn is specially provided. [Beasley, J.—"It is a surplusage."] Compare also the proxy forms in the two cases. In the case of the share-holders the proxy can be used at 'that meeting or at any adjourned meeting', but in the other only at that meeting. Therefore it must be taken that the articles prohibit an adjournment.

Even if such a power exists under the articles it has been improperly used and hence is invalid in law. I concede that each member of that body honestly thought that many policy-holders had no opportunity of attending that meeting and that that was the main or dominating purpose why the resolution for adjournment was passed. But it is *mala fide* in a legal

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

sense, as by the adjournment several proxies were rendered useless. Proxies are powers of attorney and they must be strictly construed. The proxies could be used at that meeting or at no other time and an adjournment which deprived those of the policy-holders who were present by proxy of their franchise is invalid.

The adjourned meeting was not properly held. It was not held at the company's premises as required by the articles and as fixed by the resolution of the policy-holders' meeting of the 21st April. It is true the company refused the company's premises, but the policy-holders had a right to insist that the company should give them the premises. They must have come to Court by an application for mandamus to secure the building. Not having done so, the meeting was irregularly held and the proceedings therein are therefore invalid.

A. Krishnaswami Aiyar in reply.—It is conceded that the meeting was not actuated by any dishonest motives. If that is so, the adjournment is valid. There is no such thing as constructive dishonesty' or 'constructive *mala fides*'. *See per* Lord Watson in *Adams* v. *Great North of Scotland Railway Co.*[11] It is wrong to suppose that the proxies could not be used at the adjourned meeting. It is proxy for "the meeting" and an adjourned meeting being in law only a continuation of the same meeting, the proxies would be available for that meeting also. *See* also *Maclaren* v. *Thompson.*[10]

The plaintiffs could not come in by way of mandamus. It is only the individual and personal rights of the plaintiffs that could be enforced by the writ, and it is doubtful if S. 45 of the Specific Relief Act would be applicable to a suit under O. 1, R. 8, Civil Procedure Code. It is doubtful if it applies to private companies. See *Ex parte R. Gilbert.*[12] The right in the case is in the nature of a private contractual right for which mandamus would not be available.

As to the invalidity on the score of the change of place of the adjourned meeting it does not lie in the mouth of the defendant who by their illegal refusal of the company's premises brought about this state of affairs to take this objection. The general principle that no one can take advantage of his own wrong, or even of the state of things which he himself has brought about applies. *New Zealand Shipping Co.* v. *Societe*

10. (1917) 2 Ch. 261 (C.A.).
11. (1891) A.C. 31.
12. (1892) I.L.R. 16 B. 398 at 401.

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

des Ateliers et Chantiers de France[13] and *Quesnel Forks Gold Mining Co.* v. *Ward.*[14]

The change of place is at the worst an irregularity, and it is not shown that any policy-holders have been prejudiced by it. *The King* v. *The Mayor of London.*[15] The evidence is that a man was stationed at the company's premises to direct policy-holders who did not know of the change and who went for the original place to the changed place.

The company is a stranger to the meeting, which is confined to policy-holders, and a stranger cannot raise such an objection. *Miller's Dale and Ashwood Dale Lime Co., In re.*[16] per Bacon, V. L.

There is an inherent right of adjournment in every meeting. Such right has not been taken away by the articles. If the fundamental fact that an adjourned meeting is merely a continuance of the original meeting and is in the eye of the law as if held on the original date is borne in mind, there would be no difficulty in construing the articles. If the inherent right is conceded, then the express provision as to adjournment in the articles dealing with the share-holders' meetings is superfluous. No inference can be drawn therefrom.

As an adjourned meeting is identical in law with the original meeting, these consequences follow:

(1) No notice is necessary for an adjourned meeting. *Scadding* v. *Lorant*[8] and *Kerr* v. *Wilkie.*[9]

(2) Where under the articles proxies had to be lodged within 48 hours of the meeting, they have to be lodged before the first meeting, and proxies lodged between first and the adjourned meeting are invalid. *Maclaren* v. *Thompson.*[10]

(3) Where S. 69 (2) of the Companies Act required that a resolution should be confirmed by a meeting held within one month of a previous meeting, a resolution passed at an adjourned meeting actually held beyond the period where the original meeting was within time, was held to satisfy it. *Neuschild* v. *British Equitorial Oil Co.*[17]

The provisions in the articles regarding the meeting are therefore satisfied. There is therefore a power to adjourn and that power has been properly exercised. The adjourned meet-

8. (1851) 3 H.L.C. 418.
9. (1860) 6 Jur. N.S. 383 : 119 R.R 1019. 10. (1917) 2 Ch 261 (C A).
13. (1919) A C. 1 (H L.). 14. (1920) A C. 222 (P.C).
15. (1829) 8 B. & C. 1 at 31-32: 109 E.R. 1 at 12-13.
16. (1885) 31 Ch. D. 211. 17. (1925) Ch 346.

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

ing has been properly held. Hence the election of the plaintiffs is valid.

The Court delivered the following

JUDGMENT.—The plaintiffs are advocates of this High Court and the 1st defendant is an Insurance Company with its registered office in Madras and the 2nd, 3rd, 4th, 5th, 6th and 7th defendants are directors of the 1st defendant company, the 2nd defendant being its chairman. The 8th defendant is a firm of merchants, of which the 7th defendant is a member and is the managing agent of the 1st defendant Insurance Company. The plaintiffs bring this suit (1) for a declaration that they were validly elected "Policy-holders' Directors" of the 1st defendant company for the year 1928, (2) for a declaration that the 1st defendant company has no power to nominate Policy-holders' Directors for the year 1928, (3) for an injunction against all the defendants restraining them from excluding the plaintiffs or in any way restraining or interfering with the plaintiffs acting or attending as Directors of the 1st defendant company, and (4) for an injunction against all the defendants from making any further nomination or nominations as Policy-holders' Directors for the year 1928.

The claim arises under the following circumstances. The 1st defendant company has been carrying on the business of Life Insurance from about the year 1906 and in 1926 adopted new Articles of Association which came into force from 1927. Under Art. 62 the number of directors of the 1st defendant company is to be not less than four and not more than nine and of these not more than two directors may be elected by or appointed on behalf of the policy-holders of the company. The directors so elected or appointed are to be known as "Policy-holders' Directors". This provision is repeated in Art. 70. Under Art. 73 a meeting of the policy-holders for the purpose of electing not more than two Policy-holders' Directors from amongst themselves is to be convened by the directors in 1928 and each successive year. The date and the hour at which these meetings are to be held is to be determined by the directors and the meeting is to be held after the ordinary meeting (that is, the meeting of the share-holders) of the same year and within 15 days from the date of that meeting. Art. 74 sets out the qualification of the Policy-holders' Director and Art. 75 provides that candidates for election to the office of Policy-holders' Directors are to be proposed at least 7 days before the policy-

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

holders' meeting by a notice in writing. Art. 76 requires a 14 days' notice at least of every policy-holders' meeting either by advertisement or by notice sent by post, messenger or otherwise to the registered address of every policy-holder qualified to be present and vote; but it is only in the case of policy-holders holding one or more policy or policies for not less than Rs. 3,000 in the aggregate who are entitled under this Article to a written notice; all other policy-holders are to receive notice by advertisement only; and the Article further provides that the accidental omission to give such individual notice to any such policy-holders or the non-receipt of the same by any of them shall not, if the meeting shall have been duly advertised, invalidate the proceedings thereat. Only policy-holders holding one or more policy or policies for at least Rs. 3,000 in the aggregate are entitled to vote by proxy at the meeting and the instrument appointing a proxy has to be deposited at the office of the company not less than 48 hours before the time for holding the meeting and the form of proxy is set out in that Article. The Article further makes provision for the advertisement in one English and one Vernacular daily newspaper in Madras City of the names of the policy-holders nominated as candidates for the office of Policy-holders' Directors. The voting at the meeting is to be by ballot. Art. 77 provides that, if at any policy-holders' meeting the election of Policy-holders' Directors does not for any reason (whether by the policy-holders present not choosing to elect any person or by no eligible person being available for election at the meeting or by the meeting being dissolved for want of a quorum or otherwise) take place, it shall be deemed that no Policy-holders' Directors are elected by the policy-holders for the year. And Art. 79 enables the directors of the 1st defendant company to appoint Policy-holders' Directors themselves in the event of the policy-holders not electing a director or directors at their meeting. In accordance with the Articles of Association the directors of the 1st defendant company convened a meeting of the policy-holders for the purpose of electing Policy-holders' Directors on the 21st April, 1928 at 4 P.M. at the 1st defendant company's premises. It is not disputed by the plaintiffs that the requisite notices and advertisement as to the date of the meeting and the names of the candidates for election were issued. The candidates were Messrs. C. Munusami Chetti, R. Rangachariar, the 2nd plaintiff in this suit, B. Sitarama Rao, Watrap S. Subramania Aiyar, the 1st

information that 78 of these proxies were in the name of one Mr. Sundaresa Aiyar, an agent of the company. From the minutes kept by the chairman it would appear that 120 proxy votes were in the hands of 8 of the agents and employees of the company and it was also stated by one speaker that an agent of the company had been going about in a motor-car on days previous to the meeting collecting proxies. The meeting then proceeded to pass its first resolution which was that

"Candidates for election to the places of the Policy-holders' Directors be given by this company within three days from this date a list of the policy-holders with their present addresses together with an additional list as to which of them are entitled to vote by proxy or the candidates be allowed access to the books of the company to make out their own lists of policy-holders with their present addresses as well as the list of such of them as are entitled to vote by proxy."

The 7th defendant raised a point of order and the chairman ruled that the resolution was in order and according to the minutes the resolution was passed unanimously, although I think that in view of the 7th defendant's objection he must really have voted against the resolution. The second resolution was as follows :—

"That no proxy be registered by this company in the name of this company's employees or agents for the election of the Policy-holders' Directors at the adjourned meeting as well as in future elections."

This resolution was carried by a large majority, only four voting against it. The third resolution was as follows:—

"That intimation of the adjourned meeting for the election of the Policy-holders' Directors be given forthwith in *The Hindu*, *The Swarajya*, *The Justice*, *The Andhra Patrika*, *The Matrubhumi* and *The Swadesamitran*."

This resolution was carried unanimously. The fourth resolution was as follows :—

"That individual notices by post be given by this company forthwith to every policy-holder irrespective of the value of his policy or policies of the adjourned meeting for the election of the Policy-holders' Directors."

This resolution was carried unanimously. The fifth and last resolution was one for adjourning the meeting and was as follows :—

"That this meeting for the election of the Policy-holders' Directors do stand adjourned to 5th May, 1928 at 5-30 p.m. in this company's premises."

This resolution was carried with one dissentient. The meeting accordingly adjourned until the 5th May. On the 1st May, 1928, however, the following notice appeared in the

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

Hindu. It is headed 'United India Life Assurance Company Limited': Policy-holders' Directors' and is as follows:—

"As at the meeting of the policy-holders of the company convened by the directors and held on the 21st April, 1928 for the specific purpose of electing from among the policy-holders of the company not more than two gentlemen as Policy-holders' Directors for the current year no persons were elected as Policy-holders' Directors, the Board of Directors of the company have by a resolution passed unanimously at their meeting held on the 29th April, 1928 appointed under the powers reserved to them the following two policy-holders of the company as Policy-holders' Directors to hold office as such until the election of Policy-holders' Directors in the year 1928."

Then follow the names of two persons (1) Dewan Bahadur T. Raghaviah, C.S.I., and (2) Mr. B. Sitarama Rao, B.A., B.L., High Court Vakil. This announcement was made by order of the Board of Directors of the 1st defendant company. On the 2nd May Mr. Venkatarama Aiyar, the chairman of the meeting of the 21st April, and the two plaintiffs wrote to the 1st defendant company with reference to the notification which had appeared in the *Hindu* of the previous day. The writers stated that the appointment by the directors of Mr. Raghaviah and Mr. Sitarama Rao was illegal and that the policy-holders intended to hold the adjourned meeting on the 5th May at the company's premises and at that meeting to elect their own representatives to the directorate. They requested the 1st defendant company to arrange for the adjourned meeting to be held at the company's premises and to give the policy-holders all facilities for carrying out the election. To this letter the 1st defendant company replied through its Managers pointing out that the directors had acted in a correct and proper manner in making the two appointments and pointing out that in the view of the directors the adjourned meeting would not be in order and expressing their inability to arrange for the holding of the adjourned meeting at the company's premises or providing the facilities asked for. On the same day the 1st plaintiff wrote to the 1st defendant company asking for a definite statement as to whether or not the company would allow the policy-holders to meet in the company's premises on the 5th May and the 1st defendant company on the 3rd May wrote to say that it was unable to arrange for the holding of the adjourned meeting at the premises of the company. It was then arranged with Mr. Venkatarama Aiyar, the chairman of the meeting, that as the 1st defendant company had declined to allow the policy-holders

to meet in its premises on the 5th May the meeting should be held instead at the Mahajana Sabha Hall, Mount Road; and this change of venue was on the same day and on the next advertised in the press and hand-bills to the same effect were distributed and on the day of the adjourned meeting persons were stationed at the office of the 1st defendant company to re-direct any policy-holders to the Mahajana Sabha Hall in case they should have failed to have notice of the change of venue. The meeting of the policy-holders was duly held on the 5th May and the plaintiffs were elected by ballot. There were present 62 policy-holders and the same formalities were gone through as at the previous meeting with regard to the attendance of policy-holders, namely each policy-holder was required to sign his name in the attendance book and did so. I do not think it necessary to refer to the correspondence on matters of a later date. I will content myself with stating that the directors of the 1st defendant company refused to recognise the election of the plaintiffs as Policy-holders' Directors. There is one matter which in passing I should mention and it is this, that the two gentlemen who were appointed by the directors themselves, namely Messrs. Raghaviah and Sitarama Rao, refused to accept those positions. The position therefore is that no Policy-holders' Directors have been appointed by the directors of the 1st defendant company and, if their contention is right, no directors have been validly elected by the policy-holders themselves. The plaintiffs have therefore filed this suit claiming that they were validly elected Policy-holders' Directors and for injunctions against all the defendants.

The defences put forward by the defendants at the trial were (1) that the plaintiffs were not entitled to sue, the defendants' contention being that individually they had no cause of action and that the suit should have been filed by the policy-holders as a body and the point was also taken that the directors themselves could not be sued personally, (2) that the meeting of the 21st April had no power to adjourn itself, and if it had, it was not adjourned for a *bona fide* purpose, and (3) that the adjourned meeting was irregular because it was not held in the office of the 1st defendant company as is provided for in the Articles of Association.

I shall now proceed to deal with the defendants' contentions. Mr. S. Doraiswami Aiyar on behalf of the defendants did not seriously press the defence that the plaintiffs were not entitled

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

to sue in view of the decision of Sir George Jessel, M. R., in *Pulbrook* v. *Richmond Consolidated Mining Company*[1] which seems to me to be authority both for the statement that a director who has been excluded from acting as a director by the directors of a company can sustain an action in his own name on the ground of individual injury to himself and for the statement that such an action can be sustained against the other directors. On page 612 Sir George Jessel, M. R., says:

"The first question is, whether a director who is improperly and without cause excluded by his brother directors from the board from which they claim the right to exclude him is entitled to an order restraining his brother directors from so excluding him

In this case a man is necessarily a share-holder in order to be a director, and as a director he is entitled to fees and remuneration for his services, and it might be a question whether he would be entitled to the fees if he did not attend meetings of the board. He has been excluded. Now, it appears to me that this is an individual wrong, or a wrong that has been done to an individual. It is a deprivation of his legal rights for which the directors are personally and individually liable. He has a right by the constitution of the company to take a part in its management, to be present, and to vote at the meetings of the board of directors. He has a perfect right to know what is going on at these meetings."

And on page 613 the contention of the defendants upon this point is completely negatived by the following statement:

"But in a case of an individual wrong, another share-holder cannot on behalf of himself and others, not being the individuals to whom the wrong is done, maintain an action for that wrong."

If further authority is needed it is to be found in the 10th edition of Buckley on the Companies Acts at page 621 where it is stated:

"A single share-holder may sue the company to enforce any individual right of his own, for example, his right to have his vote recorded or his right as a director to restrain his co-directors from excluding him from the board."

I think it is perfectly clear that the plaintiffs are not only entitled to maintain this suit but that no other policy-holders could on their behalf have maintained it, and further that the several defendants, the directors of the 1st defendant company, have properly been impleaded as defendants.

I now go to the question as to whether or not the meeting had power to adjourn itself. Mr. Doraiswami Aiyar's contention is that it had no such power. He has in great detail

1. (1878) 9 Ch. D. 610.

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

referred to the Articles of Association and in particular to that Article which refers to the ordinary general meeting of the shareholders of the 1st defendant company which expressly authorises an adjournment of that general meeting, that is Art. 46. He also refers to the form of proxy which is to be used at that ordinary general meeting and in particular draws my attention to the fact that on the instrument of proxy it is stated to be available at the general meeting of the company and "any adjournment thereof." I am then asked to contrast those Articles with the Articles which relate to the policy-holders' meeting. There is no Article which gives power to the policy-holders' meeting to adjourn. There is no mention of any adjournment at all. Then the instrument of proxy authorises its use at the meeting of the policy-holders to be held on the day and does not, like the proxy to be used at the ordinary general meeting, state that it is to be used or may be used at any adjournment thereof. Mr. Doraiswami Aiyar, therefore, contends that I am bound to infer from the absence of any provision in the Articles of Association for any adjournment of the policy-holders' meeting, and from the statement in it in the instrument of proxy of its exercise on the day of the meeting, with no reference to its use at any adjourned meeting, that an adjournment of the policy-holders' meeting is prohibited. I do not in the least agree with this contention. The mere absence of any provisions with regard to an adjournment does not give rise to an inference that a power to adjourn is prohibited. I am satisfied that the reasonable view to take is that it never occurred to the company when the Articles of Association were framed that it would be necessary to adjourn the policy-holders' meeting which is merely for the purpose of transacting the business of electing Policy-holders' Directors and no provision was therefore made for such a contingency. Whereas when the company had to consider the Articles with regard to the ordinary general meeting it had clearly to provide for a very obvious contingency, namely, the adjournment of such a meeting at which a great deal of business must necessarily be disposed of and which it would be likely on some occasions could not be disposed of at one meeting. The fact that no reference is made in the Articles of Association to an adjournment of the policy-holders' meeting is in my view clearly due to the failure to realise that such a contingency might arise. Nor can I see any reason why there should be any distinction intentionally drawn between

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

the ordinary general meeting and the meeting of the policy-holders or why it should be argued that it was intended that the one could be adjourned and not the other. For these reasons, in my view, Mr. Doraiswami Aiyar's contention that an adjournment of the policy-holders' meeting is prohibited by the Articles of Association is not well founded.

I have now got to consider whether the meeting had any power to adjourn itself and with regard to this I think it is beyond all question that there is a common law right in every meeting to adjourn itself—it must be so—and that every meeting is entitled to adjourn unless it is prohibited by express enactment. To say otherwise would be to prevent in a certain number of cases the proper business of a meeting being completed. It would also enable evilly-disposed persons to obstruct and prolong the meeting to such an hour as to make it impossible to continue it further. In such a case as this there must be power to adjourn the meeting so that the discussion of the business before the meeting can be continued and completed. Quite apart from the example I have given, a meeting might quite easily be necessarily and honestly prolonged to an hour when an adjournment would be inevitable. Let me take for example the case of a policy-holders' meeting for the purpose of electing Policy-holders' Directors. Suppose there should be 24 candidates for election which is by no means an impossible supposition. There might be a long discussion with regard to each of the candidates, some speakers being in favour of some of the candidates, others being opposed. This discussion would take a considerable time and, it is quite conceivable, might last many hours. According to the contention of the defendants, the discussion would have to go on notwithstanding the late hour to which the meeting had necessarily been prolonged. I think that that is an impossible view to take of the matter and I am satisfied that, quite apart from common sense, the law also gives the right to every meeting to adjourn itself unless there is an express prohibition to the contrary. There are some English cases upon the point, which, I think, clearly establish this. The first of those to which I propose to refer is *The King* v. *The Mayor, Burgesses and Commonalty of Carmarthen.*[18] I do not propose to refer to the facts of the case except to say that the question to be decided in that case was whether a meeting which

18. (1813) 105 E. R. 260.

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

had been adjourned from unavoidable necessity could be so adjourned and it was held that it could. I propose only to refer quite briefly to the passages in the judgments in that case. Le Blanc, J., said:

"Common sense shows that the charter must have meant that the corporate body should have power to adjourn in order to conclude such business as they had regularly begun, otherwise it would be in the power of any person by contrivance to protract the business and prevent the claims being effectual. Upon these grounds it strikes me that a peremptory mandamus ought to go."

Bayley, J., said:

"I have no difficulty in saying that the Corporation must of necessity have the power of adjournment, in order to conclude such business as they began, and had not time to finish on the charter-day. The business to be done is to fill up vacancies in the Corporation, and to receive the claims and hear the proofs of such persons as claim. That is the general business of the day; which I take it, constitutes one entire business, as much as the election of a mayor."

Dampier, J., said:

"It seems to me, from the very nature of this case, to be absolutely necessary that the corporate body should have the power of adjournment, in order to give effect to the inchoate rights of the claimants, and to guard against the possibility of their claims being frustrated by any contrivance."

The next case is *Stoughton* v. *Reynolds*,[6] in which it was held that the adjournment of a vestry meeting is of commonright vested in the parishioners at large and not in the vicar. The facts of that case quite shortly were that there were two churchwardens of the parish, one of whom was elected by the vicar and the other by the parishioners. At the meeting in question, the vicar nominated his churchwarden and two candidates were put up by the parishioners, one of whom was the plaintiff in that case. Some of the parishioners polled for the plaintiff and others for the other candidates. But before all the parishioners had polled, the vicar, who was in the chair, adjourned the meeting until the next day. This adjournment was opposed on behalf of the plaintiff and by some of the parishioners, but nevertheless the meeting was adjourned but several parishioners who remained at the meeting, although it had been adjourned, continued to poll and at the close of the poll that day the plaintiff had obtained a majority of the votes. At the adjourned meeting, however, the rival candidate to the plaintiff obtained a majority. It was held by the Court that the plaintiff had been duly

6. (1736) 95 E.R. 176: 2 Str. 1045.

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

elected because the vicar had no right to adjourn the meeting, which was a right which was in the persons who constituted the assembly and not in the vicar. Lord Hardwicke, C. J., said after stating that it must be shown that by law or by some custom the vicar himself has power to adjourn a meeting of the vestry and finds no authority to the contrary:

"What is the consequence? It is that the right is in the assembly itself, for, if there be an assembly all consisting of equals and there is no custom, nor rule of law, to direct the adjournment, the right must be in the persons who constitute the assembly."

In the tenth edition of Buckley on the Companies Acts, on page 615, in the Notes to Art. 55, it is stated:

"There is a common law right of adjournment of a public meeting."

It is not disputed by Mr. Alladi Krishnaswami Aiyar and Mr. Narasimha Aiyar on behalf of the plaintiffs that, although there is an inherent right in a meeting to adjourn itself, the adjournment must be for a *bona fide* purpose. I think that is quite clear as it can never be the law that a meeting can adjourn itself for the purpose of frustrating the business which it was called to transact. Mr. Doraiswami Aiyar, however, contends that this was not a *bona fide* adjournment of the meeting. He frankly concedes that the plaintiffs and those policy-holders who voted in favour of the adjournment were moved to do so from the purest and most honest of motives. He stated at the end of the plaintiffs' case that he did not propose to call any evidence for the purpose of contradicting any statement which any of the witnesses for the plaintiffs, and the first plaintiff himself, had made in the witness-box. He accepted the whole of the evidence of these persons and did not in any way desire to challenge it. That admission of Mr. Doraiswami Aiyar is a very frank one indeed and it is one which, in my view, goes the full length of establishing the plaintiffs' case that the meeting was adjourned for the purpose of getting a better representation of policy-holders at the adjournment meeting and that only. That is what all the witnesses for the plaintiffs have said. Attempts were made in cross-examination to show that the object of the adjournment was to defeat the proxies and to secure the election of persons who would otherwise not have been elected had the policy-holders proceeded to an election on that day. But one fact stands out clearly and it is this, that there was no discussion with regard to proxies at all until the sense of the meeting had been taken by Mr. Venkatarama Aiyar, the Chairman, and it had been ascertained that the meeting was entirely

in favour of adjourning until another date, the reason for the adjournment being that those present thought that although the Articles of Association had been strictly complied with, nevertheless there were numbers of policy-holders who not only had no notice of the meeting but could not have had any notice of the names of the candidates and that is what all the witnesses for the plaintiffs have said. Their evidence is accepted by Mr. Doraiswami Aiyar and is uncontradicted by any evidence called on behalf of the defendants and he also concedes that there must be many policy-holders who do not in fact get to know of the meeting. In my view it is obvious that the meeting was adjourned for a *bona fide* purpose, namely, to enable better representation of policy-holders at the election of Policy-holders' Directors ; and I find as a fact on the evidence that it was that reason which brought about the adjournment. The discussion and the passing of the other resolutions do not in my view affect the question in the least bit. It is, of course, obvious that the policy-holders could not pass those other resolutions to the effect that they did which could in any way bind the 1st defendant company for one reason alone, namely, that to carry out those resolutions would have meant an alteration in the Articles of Association. The defendants have stressed the discussion and the passing of these resolutions which, it is contended, were entirely outside the business for which the meeting was called and it is pointed out that the 7th defendant produced a letter of instruction to the meeting in which it was pointed out that the sole business to be transacted at the meeting was that of electing Policy-holders' Directors. I think myself that the Chairman was wrong in allowing those resolutions to be put as all the Articles of Association had been complied with with regard to the calling of the meeting. If they had not, then it would have been the duty of those present to have pointed that out. But I am bound to say that though these resolutions were out of order the policy-holders were not unreasonable in regarding the procedure with regard to calling the meeting and also with regard to the proxies as most imperfect and with regard to the proxies undesirable as well. Mr. Doraiswami Aiyar admitted that even if the Articles of Association were strictly complied with, there must still be a large number of policy-holders in the mofussal and outside the presidency itself who did not get notice of the meeting of policy-holders. This, I think, must be obvious, because it is only those policy-holders who hold policies aggregat-

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

ing to Rs. 3,000 who are entitled even to a written notice. The other policy-holders who are a very large majority have to depend on the advertisement in certain newspapers in the Madras City and it may be only by mere chance that they come to know of any notice with regard to the meeting, and it was in order to remedy this that the resolution to that effect was passed by the meeting. As I say it was entirely out of order. With regard to the proxies I think that the policy-holders were perfectly justified in the criticisms which they made and which resulted in the resolution being passed although that was out of order. The position is this, that the company alone has access to the list of policy-holders. It is therefore in the position of being able to collect proxies in the hands of its agents which it can use for whatever purpose it desires at a meeting. The policy-holders have no means of ascertaining who are the policy-holders entitled to vote at a meeting. In the immediate circle of their friends policy-holders may know of other policy-holders, but it is impossible for them to know to any useful extent who the policy-holders are and to obtain proxies from them which they the policy-holders can use at a meeting. This is, of course, absolutely one-sided. It means that the company can control the voting at the policy-holders' meeting and secure the election of whichever candidate or candidates the company desires and can bring about the defeat of the candidate the company does not desire to have upon its board. A great deal was said by Mr. Doraiswami Aiyar about this great and new privilege which had been granted under the new Articles of Association to the policy-holders. On the face of it it does appear to be a privilege. In fact in the hands of a company which does not choose to act in a *bona fide* manner the privilege is no privilege at all. The company can itself nominate any candidate it desires either by one of its directors who is a policy-holder or any of its servants or agents who are policy-holders because every policy-holder is entitled to nominate candidates for election. In this way the company can elect from its policy-holders any person or persons whom it may choose to be elected to its board; in other words, it can, if it chooses, select mere puppets in the hands of the other directors of the board and by means of proxies secure the election of them. And it is of importance to refer to certain facts which came out at the meeting of the 21st April. It appeared that one Mr. T. K. Sundaresa Aiyar was the holder of about 80 proxies in his own name. Mr. Sundaresa

Aiyar is an agent of the 1st defendant company and it was stated at the meeting that this gentleman had gone round in a motor-car collecting proxies previous to the meeting. Some other proxies were also held by other servants of the 1st defendant company. It is quite clear that the proxies in the hands of Mr. Sundaresa Aiyar were nearly sufficient to defeat the unanimous vote of the policy-holders present. But it does not need much common sense or effort of imagination to suppose that the 1st defendant company had collected these proxies for the purpose of using them in a certain way. The 1st defendant company was not through its agents collecting proxies merely as curios; the intention to do something with those proxies must be attributed to the 1st defendant company. I think it is beyond question that the intention of the 1st defendant company was to secure the election of two candidates of their own selection and certainly to bring about the defeat of the 1st plaintiff Mr. Watrap Subramania Aiyar. I say that for the following reasons. During the trial the nomination papers with regard to the candidates nominated for election were put in and I find this, that one of the candidates, Mr. B. Sitarama Rao, who was one of those subsequently appointed as a Policy-holders' Director by the directors themselves, was proposed as a candidate by Mr. T. K. Sundaresa Aiyar, an agent of the 1st defendant company, who was the holder of all these proxies at the policy-holders' meeting. It does not seem to me to be a violent inference to draw that Mr. Sundaresa Aiyar would have used the proxies he had in his hands for the purpose of securing the election of Mr. Sitarama Rao. I also notice that Mr. Vydianathan was proposed as a candidate by Mr. Sundaresa Aiyar. Mr. Sitarama Rao was proposed by another policy-holder as well, Mr. K. S. Rajagopala Aiyangar, who is one of the advocates at this trial for the defendants and is, I believe, one of the 1st defendant company's legal advisers, so that two of the candidates for election were proposed by an agent of the company in whose hands the bulk of the proxies were and by one of its legal advisers. I have no hesitation in describing Mr. Sitarama Rao as the 1st defendant company's candidate at the election. Mr. Sitarama Rao is a gentleman of repute and standing at the bar and no doubt would have made an excellent Policy-holders' Director, but the privilege of electing a Policy-holders' Director is supposed to be that of the policy-holders themselves and not of the 1st defendant company. But there is more than this. During

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

the cross-examination of the plaintiffs' witnesses and of Mr. Watrap Subramania Aiyar himself they were asked questions which at first I had some difficulty in seeing had any bearing upon this case. The questions put sought to establish the fact that there was at the time of the policy-holders' meeting a body called the Policy-holders' Protection Association and Mr. Watrap Subramania Aiyar was asked whether he was not or had not been an office-bearer in that association. Those questions were founded on wrong premises because the evidence is that although there had been such an association before the policy-holders' meeting it was defunct at the time of the meeting and had been so for some months, but that since the meeting that association had been revived. The suggestion of the defendants was that Mr. Watrap Subramania Aiyar was the candidate put forward by this association that was in fact incorrect, But supposing he had been, what was there wrong in a Policy-holders' Protection Association putting forward a candidate who in the opinion of that association was a person who was likely to usefully represent them on the board of directors and who would look after their interests? The questions were put to the witnesses almost as if the formation of such a body was something very wrong. Why should it be? Why should not policy-holders form an association for their own protection? There are in this Insurance Company as in others a very large number of policy-holders, a great many of whom have no doubt paid their premia for very many years and have done so with the object that at their deaths the policy money should go to their representatives, or, if they had insured for a term of years that they themselves should get the policy money. Why should they not form an association to protect their interests when they have invested a very large amount of money in the company in the shape of premia? But the fact that Mr. Watrap Subramania Aiyar was supposed to be the candidate of this supposed association, that is the Policy-holders' Protection Association, clearly shows one thing, namely, that he was on account of that association a person whom the directors did not desire to have elected to the board as a Policy-holders' Director. Mr. Watrap Subramania Aiyar, from what I have seen of him in the witness-box, is what can be described as a live wire and the fact that the 1st defendant company regard the formation of an association for the protection of policy-holders as being an association hostile to themselves, as they obviously do, leads to the not un-

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

reasonable inference that the business of the 1st defendant company is being carried on in a way which is likely to cause dissatisfaction to the policy-holders. I think that it is quite clear that the proxies in the hands of the company's servants at the meeting of the 21st April would have been used for the purpose of securing the election of those candidates who had been proposed by the company's agents and would most certainly have been used to bring about the defeat of Mr. Watrap Subramania Aiyar. Anything more likely to create feelings of distrust and suspicion in the minds of the policy-holders present at that meeting than this it is impossible to imagine. But it is because of these resolutions which were passed that Mr. Doraiswami Aiyar contends that the meeting had no right to adjourn itself. He admits that the meeting did so, as I have already said, for the purpose of securing better representation of policy-holders at the next meeting. He does not challenge the *bona fides* of the policy-holders. He admits that they were perfectly honest but he seeks to distinguish between *bona fide* in fact and *bona fide* in law. His argument is based upon a sort of theory of constructive *mala fides*; that is, however honest and high-minded a person may be in fact, in law he is dishonest and *mala fide*. That proposition strikes me as being an astounding one on the face of it. How can these persons who have been awarded by Mr. Doraiswami Aiyar the highest testimonials as to their *bona fides* and honesty be said in law to have been dishonest and *mala fide*? I confess that I cannot follow Mr. Doraiswami Aiyar's argument. Either they were *bona fide* or they were not. Elsewhere apparently an attempt to establish this strange proposition was made but was most ruthlessly dealt with by Lord Watson in *Adams* v. *The Great North of Scotland Railway Company*.[11] In another case, namely *Alexandar* v. *Bridge Allan Water Co.*,[19] a Scotch case, one of the Judges had said:

> "That which the law has stamped with the character of legal corruption may exist where the motives are perfectly pure, as no one can doubt was the case here,"

and in *Adams* v. *The Great North of Scotland Railway Company*[11] it was attempted to apply that ruling, *i.e.*, the theory of "constructive corruption" or "constructive dishonesty". On

11. (1891) A.C. 31.
19. 7 Court Sess. Cas. 3rd Series (Macph) 492 at 498, 503.

page 46 dealing with that argument Lord Watson said as follows:

"I feel bound to protest against the view expressed by some of the Scotch Judges in the cases to which we have been referred at the Bar, with regard to what they call 'constructive corruption.' I suppose that as well as 'constructive corruption' you may may have 'constructive bribery' and 'constructive falsehood.' The meaning of it appears to be this: that in order to satisfy the ends of justice in dealing with the validity of an award, it is necessary to invoke this constructive principle of which I have under all circumstances the greatest distrust; and that for the purpose of doing justice it is necessary to call a man 'corrupt' who is not corrupt but honest, to call a man 'bribed' who never listened to an improper suggestion from any quarter, to call a man 'false' who never uttered a falsehood. I do not doubt that corruption might be inferred from the terms of an award; and it is clear that, if Lord Thurlow used the expression 'constructive corruption' in *Colquhoun* v. *Corbet* [(1784) 2 Paton's App. 626], he must have used it in that sense. Even in that case the term is inappropriate, because such corruption is actual and not constructive."

Lord Bramwell at page 47 said:

"My Lords, I am entirely of the same opinion, and I desire to express my hearty concurrence in what has been said by my noble and learned friend opposite (Lord Watson) about 'constructive corruption.' I think that that and similar expressions are only used by persons who have a desire to bring about a certain result, and do not know how to do so by the use of ordinary and intelligible expressions."

I think that the observations of those two eminent Law Lords are quite sufficient to dispose of Mr. Doraiswami Aiyar's theory of constructive dishonesty and constructive *mala fides*. These observations dispose of the question as to whether the meeting had the power to adjourn itself and whether it did so for a *bona fide* purpose. The answer is, the meeting had the right to adjourn itself and did so for a perfectly *bona fide* purpose.

The next question which I have got to consider is whether the adjourned meeting was a valid one or not, not in the sense that the meeting had no right to adjourn itself but whether that adjourned meeting was a regular one. A great deal of time was occupied in argument on behalf of the defendants and some in cross-examination, in order to show that the effect of adjourning the meeting was to make the proxies valueless; in other words, that the proxies were only good for the first meeting and not for the second and that therefore the very fact of the adjournment was to disenfranchise all those policy-holders who had chosen to appoint proxies instead of themselves voting and it seems to have been the view of some of the policy-holders

Watrap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

But the defendants who seem to me to have raised every possible contention in the course of what I can only describe as very bitter litigation raise the further point that the meeting was invalid because instead of taking place in the company's office as is provided for in the Articles of Association and which was the place at which the meeting of the 21st April was called, the meeting took place in the Mahajana Sabha Hall. Before dealing with this contention I propose to state that the meeting of the 5th May was in other respects perfectly regular. No one appears to have voted at that meeting who was not entitled to vote and the voting was by ballot. I particularly asked the question of the defendants as to whether they could show that any person who voted on that occasion was not qualified to vote. This is a matter which could easily be ascertained because the book in which the signatures of all those who were present at the meeting were taken was handed to the defendants during the trial for the purpose of being examined and Mr. Doraiswami Aiyar is unable to point out a single instance of any person unqualified to vote who did so. Therefore no unqualified person voted at that meeting, nor can it be suggested that persons who desired to vote were prevented from doing so by the change of venue. The change was advertised in the press, hand-bills were distributed and the extra-precaution was taken of stationing people at the office of the 1st defendant company in order to re-direct policy-holders to the Mahajana Sabha Hall. No evidence has been called by the defendants to show that any single policy-holder was through this change of venue prevented from voting and Mr. Doraiswami Aiyar does not suggest that such was the case. But nevertheless it is said that the meeting was irregular and the election at it of the plaintiffs invalid because of this change of venue. The first question to be asked is why was the venue changed? At the meeting of the 21st April it was decided that the adjourned meeting was to take place at the office of the 1st defendant company, and I think upon the evidence given in this case that the 7th defendant did say verbally that the company would give all facilities for that meeting. As a matter of fact the company proceeded to appoint its own directors in haste. Having done so it is clear that it refused to give the facilities for the meeting being held in its office and the other facilities which the policy-holders desired; in fact, it clearly and definitely declined to allow the office to be used for the purpose of the adjourned meeting. The policy-

Wallap S. Subramania Aiyar v. The United India Life Insurance Co., Ltd.

holders therefore selected the Mahajana Sabha Hall. It was the deliberate act of the defendants that caused this change of venue and Mr. Alladi Krishnaswami Aiyar has argued with great force that it does not lie in the mouth of any one who has by his own act prevented something taking place afterwards to take exception to that state of affairs and to use that state of affairs for his own benefit. I think that that argument is a perfectly sound one. It seems to me that it would be a travesty of the law if a person who has deliberately brought about a state of affairs should be allowed to take exception to that state of affairs and use that changed state for his own advantage. Two cases were referred to, which are cases arising out of contract, where the principle of law that a party shall not take advantage of his own wrong or of an event brought about by his own act or omission was discussed. The first case is *New Zealand Shipping Company* v. *Sociéte des Ateliers et Chantiers de France.*[13] In that case the respondents contracted to construct a steamer for the appellants and the contract contained a stipulation that if the builders should be unable to deliver the steamer within, in the event of France becoming engaged in a European War, eighteen months from the date agreed by the contract for completion 'thereupon this contract shall become void and all money paid by the purchasers shall be repaid to them.' In this case it was held that the contract was void and not merely voidable because its non-fulfilment had not been brought about by any wrongful act or default on the part of the builders and it was said that a stipulation in a contract that it shall be void in a certain event is to be construed according to its natural meaning, subject to the principle of law that a party shall not take advantage of his own wrong or of an event brought about by his own act or omission. On page 6 Lord Finlay in discussing this principle states:

"It is a principle of law that no one can in such case take advantage of the existence of a state of things which he himself produced. This is illustrated by the case of *Roberts* v. *Wyatt* [(1810) 2 Taunt 268 at 276]. There the plaintiff had purchased an estate, and it was provided in the contract that the vendors should make out a good title, and on or before the 21st December, 1808, on receiving from the plaintiff the purchase money, execute a legal conveyance of the fee-simple. There was a proviso that 'in case the vendors could not deduce a good and marketable title, such as the purchaser or his counsel should approve, or if the purchaser should not pay the purchase money on the appointed day, the agreement should be utterly void'."

13. (1919) A. C. 1 (H. L.).

The defendant refused to make a good title and this principle was applied against him. Continuing, Lord Finlay says:

"Lord Ellenborough applied the same principle to a case in which it was alleged that a lease became void by the failure of the lessee to pay the rent. I may quote the following sentences from his judgment: 'In this case, as to this proviso, it would be contrary to an universal principle of law, that a party shall never take advantage of his own wrong, if we were to hold that a lease, which in terms is a lease for 12 years, should be a lease determinable at the will and pleasure of the lessee; and that a lessee by not paying his rent should be at liberty to say that the lease is void"

In *Quesnel Forks Gold Mining Company Limited* v. *Ward and ten others*[14] this principle was also dealt with. I think that the defendants cannot be heard to say that the change of venue was an irregularity such as to make the meeting of the 5th May invalid. Quite apart from this I think that this is an objection which the defendants themselves are not entitled to make. It is true that the Articles of Association provide for the meeting being held in the 1st defendant's office, but in what way have the defendants been injured? They have not shown that they suffered any injury whatever by the change of venue. The only persons who might complain—and they have not—are the policy-holders. And, moreover, I cannot see that the provision in the Articles of Association that the meeting is to be held at the company's office is an essential one. So long as the meeting was properly convened and regularly conducted, it does not seem to me to matter very much where the meeting is held. But in any case the first meeting was in fact held in the company's office strictly in compliance with the Articles of Association and I think that it would have been permissible at that meeting when it passed the resolution for an adjournment if it had then been thought to be more convenient to have adjourned the meeting to a place other than the 1st defendant's office. For the reasons I have given, in my view there is nothing in this last contention of Mr. Doraiswami Aiyar.

The result is that the defendants have failed upon all points, and the plaintiffs are entitled to all the reliefs they claim in this suit. In these circumstances, it is hardly necessary for me to deal with one of the contentions of the plaintiffs, namely, that in any event the appointment made by the directors was invalid. Since I have held that the meeting of the 21st April was properly adjourned and that the adjourned meeting was a valid one, it

14. (1920) A.C. 222 (P.C.).

follows that no appointment made by the directors of other persons to be Policy-holders' Directors could be valid. But I wish to say something more and it is this, that even supposing there had been some irregularity which would have made the adjourned meeting of the policy-holders invalid, in my view the directors were not entitled when they did to make the two appointments they made. They purported to act under Art. 77 of the Articles of Association. I have already referred to this Article, but I repeat it again. It provides that "if at any policy-holders' meeting the election of Policy-holders' Directors does not for any reason (whether by the policy-holders present not choosing to elect any person or by no eligible person being available for election at the meeting or by the meeting being dissolved for want of a quorum or otherwise) take place, it shall be deemed that no Policy-holders' Directors are elected by the policy-holders for the year." The directors decided that no Policy-holders' Directors had been elected by the policy-holders and proceeded to appoint their own two nominees to fill up the two vacancies; but although the Policy-holders' Directors had not at that date been elected there was no warrant for the directors acting in this way. It follows that if an adjourned meeting is merely a continuation of the first meeting, and is in fact *the* meeting, until that meeting is over and until the policy-holders have definitely and unequivocally expressed their intention not to elect Policy-holders' Directors or shown clearly that they are not inclined to do so, Art. 77 cannot apply at all. The only part of that Article which it is suggested by the defendants can possibly apply is that part which relates to the policy-holders present not choosing to elect any person. It is true that at the first meeting no directors were elected, but it is perfectly manifest that so far from not choosing to elect Policy-holders' Directors the whole of the efforts of the policy-holders was directed to obtaining a better representation amongst the policy-holders at the election with a view to the candidate who would be the real choice of the policy-holders being elected; and it is clear the directors cannot take advantage of Art. 77 and that the appointment of the two directors by the defendants was invalid.

There is only one other thing that I desire to say and it is this. I think that it is a most deplorable thing that this case was not settled and that it should have been fought out to the bitter end by the defendants. Efforts were made by disinterested persons to bring about a settlement and at one time it did

appear that a settlement reasonable and honourable to both parties would result, but nothing came of those efforts. However during the course of Mr. Doraiswami Aiyar's argument at my suggestion an offer was again made by the defendants and it was that there should be another election held by the policy-holders, that every facility should be given for it and that the defendants would undertake not to interfere in that election. This offer seemed to me to be a very reasonable one. However Mr. Alladi Krishnaswami Aiyar and Mr. Narasimha Aiyar and those associated with them and the plaintiffs carefully considered the matter and Mr. Narasimha Aiyar asked that the Court might be cleared in order that he might state to me the reasons why his clients viewed that offer of the defendants with the gravest misgivings and questioned its *bona fides*. The Court was cleared and I listened to his statement and also to what Mr. Doraiswami Aiyar had to say in answer to it. I do not think it right or necessary to say anything of what was stated to me. I merely content myself with saying that I am satisfied that the defendants' offer was declined by the plaintiffs in their honest belief that it was not *bona fide*. More than that I do not think it necessary for me to say.

The result must be that the plaintiffs are declared validly elected "Policy-holders' Directors" of the 1st defendant company for the year 1928 and until the election of such directors for 1929 and that it must be declared that the 1st defendant company had and has no power to nominate Policy-holders' Directors for the year 1928, that there must be an injunction against all the defendants restraining them from excluding the plaintiffs or in any way restraining or interfering with the plaintiffs acting or attending as directors of the 1st defendant company and also an injunction against all the defendants from making any further nomination or nominations as Policy-holders' Directors. The plaintiffs must have the taxed costs of this suit. This case was a long fought out one and a difficult one and in my view justifies me in awarding the plaintiffs' costs on higher scale and seeing the acts complained of were both done by the directors (but otherwise) they are individually and personally liable. I order the costs to be borne by them and met by the 1st defendant company. I certify for two counsel.

A.S.V. *Declaration and Injunction granted.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE RAMESAM, MR. JUSTICE WALLACE, MR. JUSTICE BEASLEY AND MR. JUSTICE TIRUVENKATACHARIAR.

The Commissioner of Income-tax, Madras .. *Referring Officer**

v.

A.L.S.P.P.L. Subramanian Chettiar and others .. *Assessees.*

F. B.

The Commissioner of Income-tax, Madras *v.* Subramanian Chettiar.

Income-tax Act (XI of 1922), S 10 (2) (iii)—Partner—Loan by, to partnership in addition to subscribed capital—Interest paid to him by partnership on—Deduction of amount of—Right of partnership to claim

Two persons entered into a partnership according to the terms of which they contributed to the initial capital in a certain ratio and were to share the profit and loss in a certain ratio. The deed of partnership also contemplated that, if necessary, further sums might be contributed by either party to the additional capital of the business and that interest should be charged upon it. Both the partners advanced sums as additional capital and interest was paid to them by the partnership on the sums so advanced by them.

Held by the Full Bench that the interest so paid to the partners was a legitimate item of business expenditure within the meaning of S. 10 (2) (iii) of the Indian Income-tax Act.

Per The Chief Justice and Ramesam, J.—Where a partner as partner lends money beyond the initial capital to the partnership at an agreed rate of interest and the money is used for capital expenditure, the interest paid by the partnership to him in the year of assessment must be deducted in estimating the profits or gains of the partnership within the meaning of S. 10 (2) (iii).

Per Wallace and Beasley, JJ.—An alleged borrowing of capital may be a mere device to evade the Act and not a genuine loan

Per Tiruvenkatachariar, J.—The word "capital" in its true sense means the sum which a partner contributes under the agreement of partnership for the purpose of commencing or carrying on the business and which is intended to be risked by him in the business.

It is a question of fact in each case whether the further advance made by a partner over and above the capital agreed to be put in by him is really a loan by him to the partnership or an increase of his capital in the business made with the consent of the other partners

Cases stated under section 66 (3) of Act XI of 1922 by the Commissioner of Income-tax, Madras, in the matter of the assessment of (1) A. L. S. P. P. L. Subramanian Chettiar and (2)

*Ref. Cases Nos. 21 and 22 of 1926. 20th March, 1928.

A.R.S.S.P. Subramanian Chettiar in the one case and in the matter of the assessment of (1) A.L.S.P.P.L. Subramanian Chettiar, (2) A.R.S.S.P. Subramanian Chettiar and (3) P.S. A.R. Lakshmanan Chettiar in the other, referring for the opinion of the High Court the following question, viz.:

F. B.
The Commissioner of Income tax, Madras v. Subramaniam Chettiar.

"If a partner in addition to the subscribed capital lends to the partnership, of which he is a member, a certain sum of money on the distinct understanding that in respect of this loan he is to receive interest from the partnership, whether or not the interest paid to the partner is a legitimate item of business expenditure within the meaning of section 10 (2) (iii) of the Indian Income-tax Act."

The Commissioner's references were as follows:—

R. C. No. 21 *of* 1926.—In pursuance of the order quoted above I have the honour to refer the following case for the opinion of the High Court under section 66 (3) of the Indian Income-tax Act, 1922.

2. The petitioners are Messrs. A.L.S.P.P.L. Subramanian Chettiar and A.R.S.S.P. Subramanian Chettiar of Devakottai. From the year 1900 they were carrying on money-lending business in partnership with others at Tiruppur and Palladam under the *vilasam* A.L.S.P.P.L. On 29th Chitrai, Siddharthi (12—5—1919) the partners other than the petitioners retired and the business was continued by the petitioners jointly. The terms under which they are carrying on the business in partnership are contained in a deed executed by them on 29th July, 1921. A translation of the deed is appended—Exhibit A. According to the deed the share capital of the business is Rs. 21,000, of which the senior partner A.L.S. P.P.L. Subramanian Chettiar has subscribed Rs. 15,750 as his 3|4th share, and the other partner A.R.S.S.P. Subramanian Chettiar has subscribed Rs. 5,250 as his ¼th share; the profit or loss of the business is to be enjoyed by them in proportion to their shares; and on the amounts standing to the credit of each of the partners in the partnership accounts, interest at certain stipulated rates should be charged.

3. For the assessment of the year 1925-26 based on the accounts of 1924-25 the petitioners were called upon by the Income-tax Officer, Erode, to make a return of their income under section 22 (2) of the Income-tax Act. They returned a profit of Rs. 26,166 from business. The Income-tax Officer called on them under section 23 (3) of the Act to adduce evidence in support of their return. They produced their accounts which were examined by the Income-tax Officer. The Income-tax Officer noticed that in arriving at the income shown in their return the petitioners had deducted certain inadmissible charges and the interest paid to the partners on their advances to the firm amounting to Rs. 40,835 as under:—

F. B.

The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

A.L.S.P.P.L. Subramanian Chettiar ..	Rs. 40,757.
A.R.S.S.P. Subramanian Chettiar ..	Rs. 78.

The Income-tax Officer found that the sums on which this interest was paid were advances of capital made by the partners for conducting and developing the business. He declined to admit the interest paid to the partners as a deduction from the profits of the firm on the ground that it represented a part of the profits of the partnership distributed to partners. He determined their total and taxable income to be Rs. 67,722 and charged income-tax and super-tax on this amount.

4. The petitioners appealed to the Assistant Commissioner and contended that a sum of Rs. 39,854 shown in the accounts as interest paid to the Madras shop of the senior partner A.L.S.P. P.L. Subramanian Chettiar should be allowed as a deduction in computing the profits of the partnership. The Assistant Commissioner called for and examined the accounts of the partnership. The sum of Rs. 4,01,251 standing to the credit of the Madras shop was made up thus:

	Rs.
(1) By transfer from an old account of the business adjusted in 1919. This presumably represents previous years' profits ..	1,45,145
(2) By share of profit in No. 2 account of the business adjusted in 1921 ..	84,680
(3) By share of profit in a partnership at Coimbatore adjusted in 1921 ..	1,341
(4) By transfer from Thavanai account of A.R. S.S.P. Firm, Namakkal, adjusted on 12th April, 1924 ..	73,890
(5) By interest on the above sums up to 12th April, 1925 ..	1,71,195
	4,76,251
Deduct amount transferred to current account in February, 1924 ..	75,000
Total ..	4,01,251

The bulk of the working capital of the partnership was put in by the partners. On the evidence before him, the Assistant Commissioner found that the subscribed capital of Rs. 21,000 was merely nominal, that there was an implied agreement between the partners, as suggested by the partnership deed, that additional

F. B.
The Commissioner of Income-tax, Madras
v.
Subramanian Chettiar.

capital should be invested by the partners and that the large amounts which stood to the credit of the senior partner represented such advances of capital. In the light of this finding he was of opinion that the 'interest' paid to the partner on these advances of capital was merely an assignment to him of a part of the net profits and that the provision in the partnership deed for such assignment made no difference to its character. He, therefore, upheld the Income-tax Officer's order disallowing the interest of Rs. 39,854 paid to the senior partner. He, however, made certain other allowances and reduced the taxable income of the firm to Rs. 66,001. A copy of his order is appended—Exhibit B.

5. The petitioners then applied to the Commissioner under section 66 (2) of the Income-tax Act and required him to state a case to the High Court on the question of the admissibility of the interest paid to the senior partner as a deduction in computing the profits of the firm. My predecessor Mr. Strathie held the view that interest paid to a partner could be allowed as a deduction only when it was proved that the partner had made a *bona fide* legal loan to the firm and that the question whether there has been an advance of capital to a firm by one of its partners or a *bona fide* borrowing of money by the firm from that partner was one of fact in each case. This view is supported by the decision of the Allahabad High Court in *In the matter of Lalla Mal, Hardeo Das.*[1] It was also adopted by their Lordships the Chief Justice, Mr. Justice Krishnan and Mr. Justice Beasley in deciding three applications under section 66 (3) of the Income-tax Act last year. It was in view of this expression of opinion by their Lordships that Mr. Strathie who had made a reference to the High Court (Referred Case No. 16 of 1925) on a similar question subsequently withdrew it with the consent of the party, M.A.R.N. Ramanathan Chetty, and by leave of the Court. In the present case Mr. Strathie agreed with the finding arrived at by the Assistant Commissioner on an examination of the partnership accounts that the sums advanced by the partner A.L.S.P.P.L. Subramanian Chettiar were advances of capital and, as he was of opinion that no question of law was involved, refused to state a case for the decision of the High Court. A copy of his order is appended—Exhibit C.

6. On an application under section 66 (3) of the Income-tax Act I have been directed to refer the following question for the decision of the High Court:

"If a partner in addition to the subscribed capital lends to the partnership, of which he is a member, a certain sum of money on the distinct understanding that in respect of this loan he is to receive interest from the partnership, whether or not the interest paid to the partner is a legitimate

1. (1923) I.L.R. 46 A.I.

F. B.

The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

item of business expenditure within the meaning of section 10 (2) (iii) of the Indian Income-tax Act."

7. I should perhaps explain why such a question is raised and how it is of importance. The firm now assessed is an unregistered firm. Its partners, therefore, cannot get the benefit of S. 48 of the Income-tax Act, *i.e.*, the assessment is not being made ultimately on them as individuals as it would be under the English Income-tax Law but on the firm as such. The firm must pay the tax and the partner cannot get a rebate even though his personal rate of tax may be lower than that applicable to the income of the firm. Mr. A.L.S.P.P.L. Subramanian Chettiar suffered a loss in his business during the year of account. If the sum now in question, *viz.*, Rs. 39,854 be eliminated from the firm's assessable income, the tax payable by the partnership in which he is a partner will be considerably reduced; he will not, however, pay tax in his individual assessment on the whole sum of Rs. 39,854 which he is said to have received as interest because a portion of this sum will have to be set off against his business losses, *i.e.*, if this Rs. 39,854 is assessed in the hands of the firm, the Crown will secure considerably more tax than would result from an assessment of the same sum as part of the income of the individual partner. This may appear inequitable, but it has to be remembered that members of unregistered firms enjoy certain advantages, *e.g.*, a member of several unregistered firms "suffers" tax indirectly on his share of each firm's income only at the rates applicable to the income earned by such firms and not at the rate applicable to his individual total income (which includes his share of income of the various firms) though the latter rate may be higher. He may also benefit by the proviso to section 55 (as the senior partner of the firm in question has benefited in his individual assessment) under which if the firm has paid super-tax his share of its income is not taken into account in determining his individual income liable to super-tax. There is nothing whatever to prevent any firm from applying for and securing registration under section 2 (14) of the Income-tax Act and the rules framed thereunder, if as in the present case it is constituted under a partnership deed specifying the partner's shares. The fact that there are numerous unregistered firms indicates that if they lose in some ways they stand to gain in others and that the advantage of remaining unregistered appears to them to outweigh its disadvantages.

8. Regarding the form of the question before their Lordships I venture to submit that the use of the words "lends" and "loan" places me in a difficulty. I would answer the question as it stands in the affirmative but would add that that answer cannot benefit the petitioners because in this case there has been no lending but only the usual advance of capital by a partner. The petition-

ers' case appears to be based on the maxim that "a partner in a firm can have a dual capacity, that of a creditor of the firm as well as that of a partner in it." I do not wish to dispute the truth of this maxim. I agree that a partner may be invested with this "dual capacity" if, for instance, he has lent a definite sum of money to the firm on a formal document, or if the profits of the firm remain undistributed temporarily and if it is the practice of the firm to pay interest in such a case. But I emphatically deny that there are any circumstances in the present case to justify the view that the petitioner was a creditor to the firm in respect of the sum of Rs. 4,01,251 standing to his credit in the books, even though part of his profit from the partnership may have taken the shape of interest on this sum. The sum in question was not deposited temporarily for reasons unconnected with the business. It remained invested for about 6 years, obviously because the business required it, the subscribed capital of Rs. 21,000 being wholly insufficient. The fact that interest was charged on this "surplus capital" in the accounts is no proof that it was a loan. It is no uncommon thing for a merchant trading on his own account, and not in partnership, to charge interest on his own invested capital as a business expense in the accounts, and to reckon as his business profit only the surplus remaining after this deduction has been made. The petitioners' manner of keeping their accounts is merely an adaptation of this practice to the requirements of a partnership.

9. My opinion, therefore, is that the petitioners are not entitled to a deduction of the interest paid to the partner on his advances of capital and that the question propounded by them does not arise out of the facts of the case.

R. C. No. 22 of 1926.—In pursuance of the order quoted above I have the honour to refer the following case to the High Court under section 66 (3) of the Income-tax Act, 1922.

2. The petitioners in this case are the firm of Messrs. A.L.S. P. P. L. Subramanian Chettiar, A. R. S. S. P. Subramanian Chettiar and P.S.A.R. Lakshmanan Chettiar. From the year 1902 petitioners Nos. 1 and 2 above were carrying on business in partnership with others at Gobichettipalayam and Bhavani under the *vilasam* "A.L.S.P.P.L." On the 26th Vaikasi, Siddharthi (7th June, 1919) the partners other than the first and second petitioners retired from the business. Thereafter these two persons admitted a third partner P.S.A.R. Lakshmanan Chettiar and are continuing the business in partnership. The terms under which they are said to have been carrying on the business are contained in a deed of partnership executed by them on 29th July, 1921. A translation of the partnership deed is appended—Exhibit A. According to the deed the share capital of the business is Rs. 20,100 of which the first partner A.L.S.P.P.L. Subramanian Chettiar has

F. B.
The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

subscribed Rs. 11,306-4-0 for his 9|16th share, the second partner A.R.S.S.P. Subramanian Chettiar has subscribed Rs. 6,281-4-0 for his 5|16th share, and the third partner P.S.A.R. Lakshmanan Chettiar has subscribed Rs. 2,512-8-0 for his 1|8th share. The profit or loss of the business after deducting the expenses is said to be enjoyed by them in proportion to their shares. The deed further provides that on the amounts other than the share capital standing to the credit of the partners in the partnership accounts interest at certain fixed rates should be charged.

3. For the assessment of the year 1925-26 based on the accounts of the year 1924-25 the petitioners were called upon by the Income-tax Officer, Erode, to make a return of their income. They returned a profit of Rs. 15,016 from business. The Income-tax Officer called on them to adduce evidence in support of their return. They produced their accounts which were examined by the Income-tax Officer. The Income-tax Officer noticed that in arriving at the income shown in their return the petitioners had deducted certain inadmissible charges and interest amounting to Rs. 23,471 paid to one of the partners A.L.S.P.P.L. Subramanian Chettiar on his advances to the firm. He found that the sums on which this interest was paid were advances of capital made by the partner for conducting and developing the business. He declined to admit the interest so paid as a deduction from the profits of the firm on the ground that it represented a part of the profits of the firm distributed to one of its partners. After making certain other adjustments the Income-tax Officer determined the total and taxable income of the firm to be Rs. 43,342 and levied income-tax on this income.

4. The petitioners appealed to the Assistant Commissioner and contended that the sum of Rs. 23,471 paid to the partner A.L.S.P.P.L. Subramanian Chettiar as interest on his advances to the firm should be allowed as a deduction in computing the taxable income of the firm. The Assistant Commissioner examined the accounts of the partnership from its inception, *i.e.*, from the year 1919. The sum standing to the credit of the partner A.L.S.P.P.L. Subramanian Chettiar, *viz.*, Rs. 236,242 was made up thus:

	Rs.
(1) By transfer from head-quarter account adjusted in April, 1920. This presumably represents earlier profits ..	61,329
(2) By share of profits received on dissolution of a partnership conducted by the senior partner with two others in the years 1911-1914 adjusted in April, 1922 ..	33,500

F. B.

The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

	Rs.
(3) By adjustment through the accounts of A.R.S. S. P. Firm, Namakkal, in June, 1924 (as for April, 1924) ..	67,418
(4) By interest on the above sums up to 12th April, 1925 ..	73,995
Total ..	2,36,242

On the evidence before him the Assistant Commissioner found that the subscribed capital of Rs. 20,100 was merely nominal, that there was an understanding between the partners as suggested by the partnership deed that additional capital should be invested in the partnership and that the amounts standing to the credit of the partner represented such advances of capital. In the light of this finding he was of opinion that the interest paid to the partner on the sums advanced by him as capital for the business was merely an assignment of part of the profits in his favour. In the result he agreed with the order of the Income-tax Officer in disallowing the payment of interest. A copy of his order is filed as Exhibit B.

5. The petitioners then applied to my predecessor under section 66 (2) of the Income-tax Act and required him to state a case to the High Court on the question of the admissibility of interest paid to the partner as a deduction in computing the profits of the firm. He declined to state a case to the High Court on the ground that no question of law arose. A copy of his order is appended —Exhibit C.

6. On an application made under section 66 (3) of the Income-tax Act I have been directed to refer the following question for the decision of the High Court :

"If a partner in addition to the subscribed capital lends to the partnership of which he is a member a certain sum of money on the distinct understanding that in respect of this loan he is to receive interest from the partnership, whether or not the interest paid to the partner is a legitimate item of business expenditure within the meaning of S. 10 (2) (iii) of the Indian Income-tax Act."

7. I have been directed to refer the same question in the case of the A.L.S.P.P.L. Firm, Tiruppur, and for reasons analogous to those given in my reference in that case I am of opinion that the question does not arise on the facts of this case.

M. Patanjali Sastri for Commissioner of Income-tax, Madras.

K. S. Krishnaswami Aiyangar and *V. Rajagopala Aiyar* for Assessees.

F. B.

The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

Coutts Trotter, C. J. and Ramesam, J.

The judgment of the Court was delivered by

The Chief Justice and Ramesam, J.—This case has been referred to us under section 66 (3) in pursuance of an order of this Court requiring the Commissioner of Income-tax to state a case and refer it.

The facts of the case are as follows:—According to a deed of partnership, dated 29th July, 1921, Exhibit A, A.L.S.P.P.L. Subramanian Chettiar and A.R.S.S.P. Subramanian Chettiar entered into a partnership according to the terms of which the former contributed Rs. 15,750 as his ¾ share of the capital and the latter contributed Rs. 5,250 being ¼ share of the capital, the initial capital agreed being Rs. 21,000 and they were to share the profit and loss in the ratio of 3 to 1. The document also contemplates that, if necessary, further sums may be contributed by either party towards the additional capital of the business and that interest should be charged on it. The Commissioner has found that the senior partner advanced a sum of Rs. 4,01,251 as additional capital in parts at various times and that the junior contributed comparatively a very small sum. The amount of interest on the senior partner's advances comes to Rs. 40,757 and the interest on the junior partner's advances to Rs. 78. It is now claimed on behalf of the partnership that the total of these two amounts of interest paid to the partners for sums advanced by them should be deducted in estimating the amount on which the partnership should be assessed for income-tax under section 10 (2) (iii). The Assistant Commissioner held that the whole of the additional sums advanced by the partners must be regarded really as the capital of the firm. On appeal the Commissioner in his order conceded that a partner may sometimes occupy a dual capacity, that is, he may lend a definite sum of money to the firm on a formal document in which case it would be regarded as a loan; but in the present case the sums advanced by the partners cannot be regarded as loans but as 'surplus capital'. The question to be decided by us is whether the sums advanced by the partners should be regarded as "capital borrowed for the purposes of the business" within the meaning of section 10 (2) (iii). In the argument before us the learned vakil who appeared for the Commissioner admitted that the sums advanced by the partners were capital, but he denied that it is capital "borrowed". The proposition of law for which he contended is that though a partner may make a loan to the partnership he cannot lend capital to the partnership and that additional capital required for the purposes of the partnership

F. B.

The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

Coutts Trotter, C. J. and Ramesam, J.

can be borrowed only from outsiders, in other words, though capital may be borrowed from outsiders, capital cannot be borrowed from a partner. He cited no authority for this proposition. The sub-clause itself does not contain any limitation as to the person from whom capital is to be borrowed. Once it is conceded that a partner can lend money just like any other third person it is difficult to see why he cannot lend capital also. Whether the money lent is capital or a mere loan really depends on the use to which it is put and not on the person from whom it was borrowed. If it is used for purposes similar to those for which initial capital is used, then it is capital in the hands of the partners by reason of the use which it is put to though it was money borrowed from the partners. It is not the character of the lender that determines whether the sum borrowed is capital or not. The Commissioner seems to think that, if a sum of money is deposited with the partnership temporarily for reasons unconnected with the business, it is a loan, but if it is invested for a much longer time than the business required it, the initial capital being insufficient, then it becomes surplus capital and not a loan. We are not able to follow these distinctions of the Commissioner. All sums lent to the partnership are loans whoever the parties and whatever the purpose for which they are lent. After being borrowed, if they are used like capital, they become borrowed capital, and, if they are not so used, they continue to be mere loans, the expenditure not being in the nature of capital expenditure (*vide* clause 9 of the same sub-section). In the present case the Commissioner himself found that it was capital and there is no doubt also that it was borrowed from the partners. That being so, we are of opinion that section 10 (2) (iii) applies.

It is said that there is a finding of fact by the Commissioner that the sums in question in this case are not capital borrowed within the meaning of the clause in question. The so-called finding of fact is really based upon certain facts pure and simple as to which there is no dispute and which are accepted on all hands *plus* certain supposed legal principles on which the Commissioner relies but for which there is really no authority. Wherever a sum is borrowed and it is afterwards used for capital expenditure it is not open to the Commissioner to find that it is not borrowed capital as there is no such principle of law as is contended before us on behalf of the Commissioner. It is also said that there is a finding that the initial capital was nominal and from the beginning additional capital was intended. Here again there is no dispute about the facts. The initial

F. B.

The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

Coutts Trotter, C. J. and Ramesam, J.

capital consisting of two amounts which the parties were bound to contribute is known. So far as additional or surplus capital is concerned no partner is bound to advance any particular sum. All that the deed provides is that if a partner chooses to advance certain sums he will be entitled to interest, but he is not compellable to do so. It is clear, therefore, that what is called surplus capital has different characteristics from the initial capital and it is not open to ignore this difference. The fact that a large business was contemplated for which the small initial capital would not be enough and additional capital would therefore be required has really no bearing on the legal aspect of the question, additional capital having different incidents from initial capital. Moreover, however high may be the proportion one partner may contribute in the form of additional capital relatively to the other partner, it will have no bearing on the proportion in which the profits are to be taken. This again shows that it is not open to regard additional capital as really initial capital. The Commissioner's finding being based on misconceptions of law cannot be accepted as findings of fact binding upon us.

The only other question is whether interest paid on the sums advanced can be said to be in any way dependent on the earning of profits. It is clear that the clause "Where the payment of interest thereon is not in any way dependent on the earning of profits" relates to the payability of interest, that is, the clause excludes cases where interest is payable in some manner dependent on the earning of profits. If interest is payable, whether profits are earned or not the clause applies. The learned vakil for the Commissioner argued that the scheme of the Act showed that wherever profits are earned, they were intended to be wholly assessed and the construction we are placing on this clause is inconsistent with the scheme of the Act. There is no such general scheme in the Act. In this respect the law in India seems to be different from that in England and the English cases mentioned by the learned vakil for the Commissioner have really no bearing on the construction of the Indian Act and need not be referred to. It is hardly necessary to observe that, when interest is deducted from the earnings under this clause by the partnership as its expenditure, it is really profit earned by the individual partner who takes the interest and it will be added to his income in assessing him individually. The actual rate of assessment and to what extent the State is profited or loses by the change in the assessee depends really on the actual income of the individual partner for the particular year and in the case where he has lost in his trade in any year the transfer

of the amount as his income may merely reduce his losses and may not result in any assessment. But these are all accidental circumstances which may vary year after year. One year the State may lose and another year the partnership may lose. Gain or loss to the State is really irrelevant for our purpose.

There is one further observation to be made. It is only where interest is paid that the deduction contemplated by section 10 (2) (iii) is permissible. Payment need not be actually in cash but may be by adjustment of accounts; but in whatever manner it is done it must be a real out-going. In the present case the Commissioner has found that interest has been paid as the question referred to us shows. There may be cases where no interest has yet been paid but may be due only. In such a case the partnership cannot ask for deduction of interest merely on the ground that it is due. Therefore no question arises before us on this aspect of the matter.

We, therefore, answer the question referred to us as follows:—

Where a partner as partner lends money beyond the initial capital to the partnership at an agreed rate of interest and the money is used for capital expenditure, the interest paid by the partnership to him in the year of assessment must be deducted in computing the profits or gains of the partnership within the meaning of section 10 (2) (iii).

Costs Rs. 500 will be paid by the Commissioner of Income-tax to the assessees.

The above judgment represents the joint view of Ramesam, J., and myself and was drafted by him after full discussion between us.

Referred Case No. 22 *of* 1926.—This is governed by our opinion in the other case.

Costs Rs. 100 will be paid by the Commissioner of Income-tax to the assessees.

Wallace, J.

Wallace, J.—I agree with the statement of law applicable to this case as expounded by my learned brothers, the case being one where, on the facts found, there was a genuine borrowing of capital at the prevailing market rate of interest. I only wish to guard myself against the supposition that in other cases it will not fall to be decided as a point of fact whether the alleged borrowing of capital was not a genuine loan but a mere device to evade the Act. To take an extreme case: Where two partners agree on a nominal capital and then each lends

F. B.

The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

additional capital at a fancy rate of interest calculated so high or with so little relation to the market rate, as to be obviously designed to absorb all probable profits, and thus enable them to submit a *nil* profits return, it would surely be open to the Commissioner to find that there was no genuine borrowing of capital. I agree that the present case falls under section 10 (2) (iii) of the Indian Income-tax Act.

Beasley, J.

Beasley, J.—I agree and make the same reservation as Wallace, J.

Tiruvenkatachariar, J.

Tiruvenkatachariar, J.—The answer to the question referred to the Full Bench depends upon the meaning which should be ascribed to the expression 'capital borrowed for the purposes of the business' in section 10, clause 2 (iii) of the Indian Income-tax Act. It was argued by the learned vakil for the Commissioner that any sum of money which a partner puts into the business of a firm for being used as capital cannot be treated as a loan from him to the partnership, even though the firm purports to borrow the amount from him as a loan; in other words, a firm cannot legally borrow its capital from its partners. This proposition would be quite correct if by 'capital' is meant the sum which a partner contributes under the agreement of partnership for the purpose of commencing or carrying on the business and which is intended to be risked by him in the business. That is the true sense of the word 'capital' and so far as the contribution made by a partner relates only to capital so understood, he is not a creditor of the firm. He has no right to sue the firm for the recovery of such contributions or advances and he can only get back his capital on the dissolution of the firm out of any surplus assets which may remain after meeting all its liabilities. But in the clause we have to construe, the word 'capital' appears to be used not in the sense of a partner's contribution as capital which as pointed out cannot be treated as borrowed capital but as meaning sums borrowed for capital expenditure. Such a borrowing by a firm whether from an outsider or from one of its partners cannot have the effect of increasing the capital of the firm. As observed in Lindley on Partnership :

> "If a firm borrows money so as to be itself liable for it to the lender, the capital of the firm is no more increased than is the capital of an ordinary individual increased by his getting into debt."

So it is the advances made by a partner to a firm over and above the amount which he has agreed to subscribe towards the capital of that business cannot be treated as an

F. B.

The Commissioner of Income-tax, Madras v. Subramanian Chettiar.

Tiruvenkatacharlar, J.

increase of his capital but as a loan made by him and if such advances are made for being used for the same purposes for which the original capital was intended to be used, they will be capital borrowed for the purpose of business within the meaning of section 10, clause 2 (iii), and, if the other requirements of that clause are satisfied, the payment of interest on such borrowings should be deducted from the profits of the business. It is a question of fact in each case whether the further advance made by a partner over and above the capital agreed to be put in by him is really a loan by him to the partnership or an increase of his capital in the business made with the consent of the other partners. So far as the present case is concerned, the question referred treats the advances in question as loans made by the partner to the firm for being utilised as capital and there seems to be no valid ground for questioning that fact. I therefore agree that the question should be answered in the affirmative.

A. S. V. *Reference answered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS, MR. JUSTICE RAMESAM AND MR. JUSTICE MADHAVAN NAIR.

Penmetcha Subbaraju .. *Appellant** *(Petitioner-Defendant)*

v.

Penmetcha Venkatramaraju .. *Respondent* *(Counter-petitioner-Plaintiff).*

F. B

Subbaraju v. Venkatramaraju.

Civil Procedure Code (V of 1908), O. 23, R. 3—Suit—Reference to arbitration in pending, without order of Court—Award made on—Decree in terms of, if can be passed under R. 3—Civil Procedure Code, S. 89, Sch. II—Effect.

Where, in a suit, parties have referred their difference to arbitration without an order of the Court and an award is made, a decree in terms of the award can be passed by the Court under O. 23, R. 3, Civil Procedure Code, or otherwise, the parties not accepting the award.

An agreement to abide by the decision of an arbitrator is a compromise of the claim within the meaning of O. 23, R. 3, Civil Procedure Code, and an award comes within the meaning of compromise in that rule.

The words "any other law" in S. 89 of Civil Procedure Code ought not to be interpreted as excluding the law laid down in other parts of the Civil Procedure Code.

---

*A.A.O. No. 209 of 1927. 17th April, 1928.

F. B.

Subbaraju v. Venkatramaraju.

Sch. II of Civil Procedure Code is not mandatory, and if parties to a suit choose to refer to arbitration, it is open to them to adopt the provisions of that schedule or not as they please, and where the award satisfies the provisions of O. 23, R 3, the parties can proceed in accordance with that rule.

Appeal against the order of the Court of the Subordinate Judge of Narsapur, dated 28th March, 1927, and passed in Civil Miscellaneous Petition No. 633 of 1927 in Original Suit No. 16 of 1926.

P. Somasundaram for appellant.

V. Suryanarayana for respondent.

The Court (Ramesam and Jackson, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.—This is an appeal against the order of the Subordinate Judge of Narsapur refusing to pass a decree in terms of an award. The petition was filed by the defendant under Order 23, Rule 3 of the Civil Procedure Code. The Subordinate Judge observes:

"There is no written order of reference to arbitration. Parties made no reference through Court. Petition is dismissed."

The order of the Subordinate Judge shows that he thought that a decree in terms of an award could be passed only if a reference is made through Court. It is not the defendant's case that there was a reference through Court. His case is that there was a reference without the intervention of the Court and an award was passed and that a decree can be passed on such an award under Order 23, Rule 3. The respondent denies such a reference but the matter was not enquired into by the Subordinate Judge. The petitioner in the Lower Court is the appellant before us and he asks that the matter may be enquired into, that is, whether a reference was, as a matter of fact, made.

The learned vakil for the respondent argues that Order 23, Rule 3 should not be applied to a case like this where a reference is made to arbitrators and an award is passed without the intervention of the Court. There is great conflict of opinion on this question in all the Indian Courts. The latest decision of this Court is in *Ayyannamma* v. *Ramaswami*,[1] where it was held that Order 23, Rule 3 applies, following earlier decisions of this Court. The earliest decision of this Court, *Lakshmana Chetti* v. *Chinnathambi Chetti*,[2] was prior to 1908, but all the other decisions are on the new Code; some of these can be distinguished on the ground that the parties have accepted the award and therefore they were acting practically on the footing

1. (1927) 53 M. L. J. 444. 2. (1900) I. L. R. 24 M. 326.

F. B.

Subbaraju v. Venkatramaraju.

of a compromise, but others cannot be distinguished on this ground. In *Bodachari* v. *Muniyachari*[1] the award dealt with matters which were the subject-matter of a pending suit and other matters which were not the subject-matter of the suit. The decision may be distinguished on the ground of this difference in the facts, but it must be noted that the learned Judges who decided the case, Krishnan and Odgers, JJ., were inclined to follow the decision in *Shavakshaw* v. *Tyab Haji Ayub*[4] to be presently referred to. It was also conceded in *Ayyannamma* v. *Ramaswami*[1] that there is great force in the argument based on section 89 of the Civil Procedure Code.

Coming to the Bombay High Court, Macleod, C. J., originally held in *Shavakshaw* v. *Tyab Haji Ayub*[4] that Order 23, Rule 3 would not apply to a case of this kind but he departed from this view in *Mani Lal Moti Lal* v. *Gokal Das*.[5] The matter came before a Full Bench in *Chanbasappa* v. *Baslingayya*.[6] Marten, C.J., in his final judgment relies on the definition of the term "compromise" given in Murray's Dictionary as including a reference to arbitrators, but as observed by my learned brother in the course of the arguments, even then, the term "compromise" may not apply to the actual award in which it ends. In the Allahabad High Court the matter went up to a Full Bench in *Gajendra Singh* v. *Durga Kunwar*,[7] and it was held that Order 23, Rule 3 applies, but in a later decision of the same Court in *Baij Nath Prasad* v. *Narain Prasad*,[8] a bench of two Judges, Mukerji and Boys, JJ., held that Order 23, Rule 3 did not apply on the facts of that case. The same view was taken in Lahore, the latest decision being *Hari Prasad* v. *Soognidevi*.[9] In Calcutta, the latest decision is *Amar Chand Chamaria* v. *Banwari Lall Rakshit*,[10] where Rankin, J., takes the same view as in *Shavakshaw* v. *Tyab Haji Ayub*[4] following an earlier decision of his.

In these circumstances it seems to be desirable that the matter should be referred to a Full Bench. We observe that there is great force in the argument based on section 89 of the

---

1 (1927) 53 M.L.J. 444 3. (1921) 14 L.W. 666.
4 (1916) I.L.R. 40 B 386. 5 (1920) I.L.R. 45 B. 245.
6 (1927) I.L.R. 51 B. 908: 29 Bom L.R. 1254 (F.B.).
7. (1925) I. L. R. 47 A 637 (F.B.)
8 (1927) 102 I. C. 608. 9. (1921) 3 Lah. L. J. 162.
10. (1921) I.L.R. 49 C. 608.

F. B.

Subbaraju v. Venkatramaraju.

Civil Procedure Code. There is no doubt that it is the intention of the legislature that, in all cases of arbitration and awards, the procedure in Schedule II should be observed. The only difficulty arises on account of the fact that sub-clause (2) of clause 20 of the second schedule contemplates that the application to file the award should be registered as a suit. Where there is already a pending suit, this means that there will be two parallel suits covering the same matter. Obviously, it is inconvenience of this kind that has induced Judges to apply Order 23, Rule 3 in cases where there is a reference to arbitration and an award is made without the intervention of the Court where a suit is pending. This difficulty can, no doubt, be met by suitably amending sub-clause (2) of clause 20 of Schedule II, but until such an amendment is made, to apply Order 23, Rule 3 seems to be going in contravention of the provisions of section 89, Civil Procedure Code.

We refer the following question to a Full Bench:

"Where in a suit parties have referred their difference to arbitration without an order of the Court and an award is made, can a decree in terms of the award be passed by the Court under Order 23, Rule 3 or otherwise, the parties not accepting the award?"

This appeal against order came on for hearing on Tuesday, the 3rd April 1928.

P. Somasundaram for appellant.

T. M. Krishnaswami Aiyar for *V. Suryanarayana* for respondent.

The Court expressed the following

Phillips, J.

OPINION. *Phillips, J.*—The question referred to us for decision is

"Where in a suit parties have referred their difference to arbitration without an order of the Court and an award is made, can a decree in terms of the award be passed by the Court under Order 23, Rule 3, or otherwise, the parties not accepting the award?"

This question has frequently come up for decision in this Court and has almost invariably been answered in the affirmative.

In *Nanjappa* v. *Nanjappa Rao* [11] it was held that an award in such circumstances was a lawful agreement, compromise and adjustment within the meaning of section 375 of the Civil Procedure Code, 1882, which is the section corresponding to

11. (1912) 23 M.L.J. 290.

F. B.
Subbaraju v. Venkat-ramaraju.
Phillips, J.

Order 23, Rule 3. In that case the previous decisions of this Court were referred to and followed. The subsequent cases in which the decision was under the Code of 1908 have held that Order 23, Rule 3 can be applied in such circumstances. *Chinna Venkatasami Naicken* v. *Venkatasami Naicken*,[12] *Belagoduhal Virabadra Gowd* v. *Kalyani Gangamma*,[13] *Alagu Pillai* v. *Mayilappa Pillai*,[14] *Chintalapalli Chinna Dorayya* v. *Chintalapalli Venkanna*[15] and *Ayyannamma* v. *Ramaswami*.[1]

The only cases in which a different opinion has been expressed are *Venkatachala* v. *Rangiah*[16] and *Bodachari* v. *Muniyachari*.[3] In the former case there was a mere agreement to refer but no award in pursuance of that agreement, and it was held that that was not an adjustment within the meaning of the Code. In the latter case, Krishnan and Odgers, JJ., were inclined to hold that section 89 of the Civil Procedure Code was a bar to the application of Order 23, Rule 3 in such cases, but did not definitely decide the point. It will be seen, therefore, that so far as this Court is concerned the view taken almost unanimously has been that Order 23, Rule 3 is applicable in such circumstances; but this reference has been made because the Calcutta High Court and the Lahore High Court have held to the contrary. In Calcutta the leading case is *Amar Chand Chamaria* v. *Banwari Lall Rakshit*,[10] a decision of Rankin, J., sitting as a single Judge, in which he followed an earlier decision of his own. This was followed by a Bench in *Guimoni Dasi* v. *Tarini Charan Porel*.[17] The Lahore High Court took the same view in *Hari Prasad* v. *Soogniidevi*[9] and based their decision on the provisions of section 89 of the Civil Procedure Code. In Bombay Macleod, C. J., agreed with the Calcutta view in *Shavakshaw* v. *Tyab Haji Ayub*,[4] but in a subsequent case, *Manilal Motilal* v. *Gokal Das Rowji*,[5] he came to the opposite conclusion. The question was referred to a Full Bench and in *Chanbasappa* v. *Baslingayya*[6] it was held that Order 23, Rule 3 was applicable. The Allahabad High Court (Full

1. (1927) 53 M.L.J. 444. 3. (1921) 14 L.W. 666.
4. (1916) I.L.R. 40 B. 386. 5. (1920) I.L.R. 45 B 245.
6. (1927) I.L.R. 51 B. 908: 29 Bom. L.R. 1254 (F.B.)
9. (1921) 3 Lah. L.J. 162 10. (1921) I.L.R. 49 C 608.
12. (1919) I.L.R. 42 M. 625: 36 M.L.J. 291.
13. (1926) 97 I.C. 465. 14. (1923) 45 M.L.J. 76.
15. (1923) 76 I.C. 502.
16. (1911) I.L.R. 36 M. 353. 21 M.L.J. 990.
17. (1927) 104 I.C. 360.

F. B.
Subbaraju v. Venkatramaraju.
Phillips, J.

Bench) have taken the same view in *Gajendra Singh* v. *Durga Kunwar*,[7] although in a subsequent case, *Baij Nath Prasad* v. *Narain Prasad*,[8] a Bench of two Judges held that Order 23 did not apply in the particular case they were considering which was a case where the requirements of clause 20, Schedule II, Civil Procedure Code, had been complied with, and it was held that the award should be treated as an award and not as a compromise of the suit. The main body of opinion is therefore clearly in favour of an affirmative answer to the question before us, but it will be advisable to consider the matter in its legal aspects.

In the first place, is Order 23, Rule 3 in terms applicable to the case before us? Rule 3 provides:

"Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise . . . ."

If an agreement to abide by the decision of an arbitrator can be held to be a compromise, the section is clearly applicable. It has been suggested that a mere agreement to be bound by a future award is not a compromise, whereas an agreement to accept an award that has been made is a compromise. It is difficult to see on what principle parties who agree to accept a certain fixed sum in satisfaction of a claim can be said to compromise that claim, whereas if they agree to accept a sum which is to be fixed by some one else, that does not amount to a compromise. The meaning of the word "compromise" has been elaborately discussed by Martin, C. J., in *Chanbasappa* v. *Basingayya*,[6] and, with respect, I entirely agree with him that the agreement to abide by the decision of an arbitrator is a compromise of the claim.

The main objection that has been taken to the application of Order 23, Rule 3 is that it is opposed to section 89 of the Civil Procedure Code. That section runs as follows:

"Save in so far as is otherwise provided by the Indian Arbitration Act, 1899, or by any other law for the time being in force, all references to arbitration whether by an order in a suit or otherwise, and all proceedings thereunder, shall be governed by the provisions contained in the second schedule."

Two arguments are advanced in support of this proposition, firstly, that the words "any other law for the time being in force" cannot include Order 23 which finds a place in the schedule to the Civil Procedure Code itself, and secondly, that

6. (1927) I.L.R. 51 B. 908: 29 Bom. L.R. 1254 (F.B.).
7. (1925) I.L.R. 47 A. 637 (F.B.).
8. (1927) 102 I.C. 608.

F. B.

Subbaraju
v.
Venkat-
ramaraju

Phillips, J.

section 89 is exhaustive and provides that all references to arbitration shall be governed by the second schedule of the Code. The first argument does not appeal to me, for if the whole of the provisions of the Civil Procedure Code are excluded by the words "any other law for the time being in force" it would mean that the provisions of the second schedule were exhaustive and self-contained, and the various rules of procedure laid down in the other parts of the Code would be inapplicable. The words "any other law" are very general and there seems to be no reason for interpreting them as excluding the law laid down in other parts of the Civil Procedure Code. The second argument that section 89 makes the second schedule exhaustive and therefore excludes the provision of Order 23 in cases of award has more force. If an award comes within the meaning of compromise in Rule 3, as I have found that it does, a certain right is conferred on parties by that section and that right cannot be taken away except by a specific enactment. Unless it is necessary to read section 89 as having that effect, it should not be so read. In the first place, the second schedule, Civil Procedure Code, is not mandatory, but provides for reference to arbitrators at the will of the parties and also provides that certain procedure must be followed if they take action under this schedule. It does not, however, say that there shall be no arbitration other than what is dealt with by the second schedule, and if parties to the suit choose to refer to arbitration, it is open to them to adopt the provisions of the second schedule or not as they please. In the present case the parties have agreed to decide a pending litigation in accordance with the award of an arbitrator. Under clause 20 of the second schedule they could apply to have the award filed in Court and then the procedure provided by that clause would be followed. If, however, the award satisfies the provisions of Order 23, Rule 3, there is no provision in the Civil Procedure Code which expressly takes away the right of the parties to proceed in accordance with the section; and unless that right is clearly taken away by law, it must be enforceable in Court, and certainly there is no express provision of law which takes away such right, nor any provision which necessarily has that implication. I am, therefore, of opinion that Order 23, Rule 3 can be applied in the circumstances of the present case, although I am not prepared to hold that in appropriate circumstances the parties would be precluded from taking action under clause 20 of the second schedule.

F. B.

Subbaraju v. Venkatramaraju.

Phillips, J.

Another argument has been adduced by Mr. T. M. Krishnaswami Aiyar for the respondent, namely, that when parties engage in litigation and give the Court jurisdiction to decide their dispute, it is not open to oust that jurisdiction by an agreement among themselves; and reliance is placed on *Doleman and Sons* v. *Ossett Corporation*,[18] which was followed in *Ram Prosad Surajmull* v. *Mohan Lal Lachminarain*[19] and *Appavu* v. *Seeni*.[20] That case is not, however, at all applicable to the present question, for there it was held that, when there was, what is called an arbitration clause in an agreement and in contravention of that clause a suit had been filed, it was not open to plead an award given after suit as a bar to the action. There, however, the agreement to submit the disputes for arbitration was made before the suit was filed and on this ground the case is distinguishable. Fletcher Moulton, L. J., observed at page 269:

"It follows, therefore, that in the latter case the private tribunal, if it has ever come into existence, is *functus officio* unless the parties agree *de novo* that the dispute shall be tried by arbitration as in the case where they agree that the action itself shall be referred."

Farwell, L. J., also observed at page 274:

"When the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent."

From these observations it is clear that the learned Judges distinguished the case they were considering from one in which the parties make a reference to arbitration after the suit had been filed and that the latter was not governed by their decision. I am, therefore, of opinion that the question referred to us must be answered in the affirmative.

Ramesam, J.—I agree.

Madhavan Nair, J.—I agree.

A.S.V. *Question answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Muthuswami Kavundan and others .. *Appellants** (*Plffs.*)

v.

Ponnayya Kavundan and others .. *Respondents* (*Defts.*).

Muthuswami Kavundan v. Ponnayya Kavundan.

Hindu Law—Widow not heir of last male owner but entitled to maintenance and residence out of it—Possession of—Nature of, rightful or wrongful

---

*Appeal No. 456 of 1923. 13th March, 1928

18. (1912) 3 K.B. 257. 19. (1920) I.L.R. 47 C. 752.

20. (1916) I.L.R. 41 M. 115: 33 M.L.J. 177.

—Sums spent by her for purposes binding on estate—Repayment of—Right to—Nature of—Suit by her to recover such sums—Limitation—Starting point—Limitation Act, Arts 61, 120, 132*—Applicability.*

When a Hindu widow who is entitled to maintenance and residence continues to be in possession of the estate after the death of the last male holder to whom she is not the heir, her possession cannot be held to be wrongful at least till the reversioners entitled assert the right to possession and demand it from her. She can, in a suit brought by the reversioners, claim payment of the sums spent by her for purposes binding on the estate of the last male holder irrespective of any plea of limitation. She is not entitled to a charge on the estate in respect of the sums paid by her, even if they went in discharge of money decrees in execution of which the estate might otherwise have been sold. Art 61, and not Art. 132 or Art. 120 of the Limitation Act is applicable to a suit brought by her for the recovery of the amounts so paid by her; time runs from the date she made the payments or at least from the time the reversioners claimed the estate, and her act in keeping possession of the estate will not enlarge the period.

Appeal against the decree of the Court of the Subordinate Judge of Trichinopoly in O.S. No. 87 of 1922, dated 31st July, 1923.

K. S. Sankara Aiyar for appellants.

N. Rajagopalachari for respondents.

The judgment of the Court was delivered by

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the plaintiffs to recover Rs. 5,035 alleged to be due on a deed of mortgage executed by the 4th plaintiff in favour of plaintiffs 1 to 3 on the 29th November, 1918.

One Ponnia Gounden died in 1909 leaving a widow (4th plaintiff), three daughters and a son by another wife. On Ponnia Gounden's death his son succeeded him and died in 1910. His step-mother, though not the heir under Hindu Law, took possession of the estate, got pattas transferred to her name and was in enjoyment of the properties. The defendants claiming to be reversioners filed a suit in 1915 which they withdrew and filed another suit O.S. No. 478 of 1916 to recover possession of the properties on the ground that the 4th plaintiff was not the heir to the last male holder. The suit was disposed of on an alleged compromise. The widow denied she ever compromised the suit and the case was remanded by the Appellate Court and finally disposed of in 1920 in favour of the reversioners. The widow all along denied that they were the reversioners or had any right to the properties. While the widow was in possession she executed a promissory-note, dated 22nd April, 1915 in favour

Muthuswami Kavundan v. Ponnayya Kavundan.

Kumaraswami Sastri, J.

of the 1st plaintiff for Rs. 850 alleging that the money was borrowed to discharge her husband's debts. In 1915 this note was renewed (Exhibit B). She again borrowed alleging that money was required for the marriage of her daughter and executed a promissory-note in favour of the 1st plaintiff for Rs. 1,000 (Exhibit C). In 1918 she executed a pronote Exhibit D in favour of the 1st plaintiff for Rs. 2,350 in renewal of the notes Exhibit B and Exhibit C. She executed a mortgage Exhibit E for Rs. 4,000 in November, 1918 in favour of the plaintiffs 1 to 3. 2nd and 3rd plaintiffs are the 1st plaintiff's sons. The consideration is said to be the amounts due on the prior promissory-notes and further moneys advanced to the 4th plaintiff for expenses of the litigation.

The Subordinate Judge dismissed the plaintiffs' suit. As regards the consideration he was of opinion that only Rs. 526-8-0 made up of Rs. 200 spent for the marriage of her daughters and Rs. 101-8-0 paid in respect of L-2 and Rs. 225 under Exhibit L, her husband's debt, were for purposes binding on the reversioners and that the suit was barred by limitation.

O.S. No. 478 of 1916 was filed on the 16th August, 1916 and the final decree was passed on the 31st January, 1920 and the present suit was filed on the 15th January, 1921.

The appellants' vakil does not base his right on the mortgage deed, Exhibit E. The mortgagor (4th plaintiff) was not entitled to the property and it is difficult to see how her mortgage can bind the reversioners.

His contention is that she while in possession of the estate having borrowed moneys to discharge her husband's debts and to perform the marriages of her daughters, which obligation was on the defendants as reversioners and heirs of her husband and her step-son, the same are payable to her by the defendants and that though the mortgage as such is invalid the plaintiffs are entitled to recover so much of the consideration as is proved to have been spent for purposes which the defendants were bound by. She claims Rs. 100 due under F series, Rs. 225 due under N series, Rs. 101 due under L-2, Rs. 330 under L-1, Rs. 750 for expenses incurred in connection with the marriages of her daughters. She also claims Rs. 70 due to Government and paid by her in respect of a loan got by her husband under the Agriculturists Loans Act. As regards this claim she admits in her evidence that the loan was for the purchase of bulls and that she has the bulls in her possession. It is difficult to see

Muthuswami Kavundan v. Ponnayya Kavundan.

Kumaraswami Sastri, J.

how she can keep the bulls and claim credit for the repayment of the loan.

Having regard to the income of the estate and the position in life of the parties we think the Subordinate Judge was right in holding that only Rs. 200 can be reasonably allowed for the marriages. We also think that the evidence shows that the only amounts binding on the reversioners are those found by the Subordinate Judge, namely, Rs. 225 paid under Exhibit L, Rs. 101-8-0 paid under Exhibit L-2 and Rs. 200 spent for the marriage expenses.

It was open to the widow in her written statement to claim payment of the sums she spent for purposes binding on the reversioners. She did not do so. There would have been no question of limitation where in a claim to recover possession of the estate the widow in possession claims just allowances when accounts are taken in respect of sums which would be lawfully payable out of the estate of the last male holder.

We do not think that when a widow who is entitled to maintenance and residence continues to be in possession of the estate after the death of the last male holder to whom she is not the heir her possession can be wrongful at least till the reversioners entitled assert the right to possession and demand it from her. In this case no claim was made by the reversioners till they filed the suit in 1915 which they withdrew and filed a fresh suit in 1916. I do not agree with the contention of the respondents' vakil that the widow having been in wrongful possession she is not entitled to claim any sums spent by her for purposes binding on the reversioners. The cases cited by him do not touch the present case. *Tiluck Chand* v. *Soudamini Dasi*[1] was a case where a person took wrongful possession of the estate and held it adversely to the true owner. *Swarnamoyee Debi* v. *Hari Das Roy*[2] and *Binda Kuar* v. *Bhonda Das*[3] were also cases of a person in wrongful possession and the learned Judges followed *Tiluck Chand* v. *Soudamini Dasi.*[1] In *Abdul Wahid Khan* v. *Shaluka Bibi*[4] all that was held was that when a person takes legal proceedings for his own benefit and without any authority express or implied from the plaintiff the fact that the result was also a benefit to the plaintiff does not create any implied contract or give the defendant any equity to be paid a share of the expenses.

1 (1878) I.L.R. 4 C. 566. 2. (1902) 6 C.W.N. 903.
3 (1885) I.L.R. 7 A. 660. 4. (1893) I.L.R. 21 C. 496: 21 I.A. 26 (P.C.).

Muthuswami Kavundan v. Ponnayya Kavundan.

Kumaraswami Sastri, J.

In *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[5] their Lordships of the Privy Council held that a person in possession under a decree which was subsequently reversed is entitled to recover taxes paid by him during the time he is possessor from the defendants in whose favour the decree was ultimately made. Their Lordships reversed the decree of the High Court which was based on the ruling in *Tiluck Chand* v. *Soudamini Dasi.*[1] In *Imbichi Mamad* v. *Manavikramasamathripad*[6] it was held following *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[5] that a person dispossessed of property held by him under a title that was held bad was entitled to claim rents and revenue *bona fide* paid by him while in possession.

I am of opinion that as regards 4th plaintiff's claim the amounts found by the Subordinate Judge to be binding on the reversioners is sustainable and that plaintiffs are entitled to recover this sum if the claim is not barred.

As regards limitation it is clear from the facts that the 4th plaintiff has no charge on the estate. The decrees satisfied by her were simple money decrees and there can be no charge created on the estate on the mere ground that she discharged them. The only ground urged is that by paying off decrees against the estate the 4th plaintiff acquired a salvage lien as otherwise the properties would have been attached and sold. I do not think that the discharge of a money decree which might be realised in execution by the sale of immoveable properties of the judgment-debtor gives a person making the payment a charge and no authority has been cited by the appellants' vakil. A claim for contribution is a personal claim and unless the law gives a charge the remedy is a personal one. In *Shivrao Narayan* v. *Pundlik Bhaire*[7] it was held that payment of assessment by one sharer when the Land Revenue Code does not give a charge did not entitle plaintiff to a charge and that Art. 132 of the Limitation Act did not apply. I may also refer to *Gopala Aiyangar* v. *Mummachi Reddiar*[8] where Spencer, J., observes:

"When one person pays off a debt which another has to pay the ordinary relief that a Court can give is a personal decree against the defendant for money had and received as section 69 of the Contract Act does not give any higher remedy. If that remedy is barred owing to

1. (1878) I.L.R. 4 C. 566.
5. (1893) I.L.R. 21 C. 142: 20 I.A. 160 (P.C.).
6 (1896) 7 M.L.J. 211.
7. (1902) I.L.R. 26 B. 437.
8. (1922) 17 L.W. 254.

Muthuswami Kavundan v. Ponnayya Kavundan.

Kumaraswami Sastri, J.

plaintiff's delay he cannot extend the period of limitation by asking for an enlarged relief by way of a charge on defendant's property."

Where as in the present case a person has to rest his claim on the ground that he made a payment which another is in law bound to pay and brings his case within section 69 of the Contract Act it seems to me that Art. 61 of the Limitation Act is applicable when the case cannot be brought under Art. 132. In *Rajah of Vizianagram* v. *Rajah Setrucherla Somasekhararaz*[9] the question was considered by Bhashyam Aiyangar, J., who held that in the absence of a charge the only article applicable would be Art. 61 or 99 and not Art. 120 of the Limitation Act.

Reference was made to *Kaliba Movulvija Muhammad Usan Kadiri Abkan Sahib* v. *Soran Bivi Saiba Ammal*[10] by the vakil for the appellants as authority for holding that Art. 120 is applicable to cases like the present. In that case a person was appointed a trustee for a mosque during the minority of the trustee entitled to the office. In a suit to recover possession the trustee appointed during the minority of the plaintiff set up a claim to remain in possession till he was paid advances made by him to the trust but his right to remain in possession was disallowed and he had to give up possession. He then sued to recover the advance and it was held that Art. 120 applied and not Art. 132. It is difficult to see how a widow who is not the heir of the last male holder and who remains in possession of the estate can be in the position of a trustee remaining in possession after his office has ceased.

It has been argued that even if Art. 61 applies the 4th plaintiff could not have sued the defendants till she gave up possession of the estate after a decree was obtained by them and that limitation will run only from 1920 and the suit having been filed in 1921 will be in time. I do not see anything which would have prevented the 4th plaintiff from filing her suit when defendants claimed the estate from her. She cannot by holding on extend the period of limitation when the rightful owners claim the estate and in this case defendants have been held to be the rightful owners. The widow in possession who has a claim against them is entitled to demand the sum she claims and to sue them. Time will begin to run from the date she made the payments or at least from the time the rightful person claimed the estate and

9. (1902) I.L.R 26 M. 686 : 13 M.L.J. 83 (F.B.).
10. (1913) I.L.R. 38 M. 260: 28 M.L.J. 347.

Muthuswami Kavundan v. Ponnayya Kavundan. — Kumaraswami Sastri, J.

her act in keeping possession of the estate will not enlarge the period.

The appeal fails and is dismissed with costs.

A.S.V. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE DEVADOSS, MR. JUSTICE BEASLEY, MR. JUSTICE WALLER AND MR. JUSTICE JACKSON.

M. Visvanadha Rao and others .. *Petitioners* *

(Counter-Petitioners).

F. B. — Visvanadha Rao, *In re.*

Processions—Right of community to conduct—Decree of Civil Court declaring—Enforcement of—Duty of Government—Danger to public interest at large by such enforcement—Duty in case of—Court's power to compel enforcement even in such a case.

The preservation of the public peace is the function of the Government, and in the performance of that function, it may be necessary for them to override temporarily private rights. Where there is a conflict between the public interest and a private right, the former must prevail.

It is not the duty of the authorities to enforce the decree of a Civil Court declaring the right of Hindus to conduct processions with music in all circumstances and at all costs, and if the Government consider that the right cannot be effectively enforced except by a method which will endanger the public interest at large, it is not for the Court to say that they are bound to adopt that method or to suggest other means of enforcement.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act praying the High Court to revise the proceedings of the District Magistrate of Nellore, dated 7th October, 1927 under section 144 of Criminal Procedure Code.

V. L. Ethiraj, C. Narasimhacharriar and *A. Krishnaswami Aiyar* for petitioners.

The Advocate-General and the *Public Prosecutor* for the Crown.

The Court made the following

ORDER.—This Criminal Revision Petition has been placed before a Full Bench at the instance, we are informed, of the Public Prosecutor. The dispute out of which it arises is concerned with the rights of the Hindus of Nellore town to conduct processions with music past the mosques of that place. The Hindus have obtained from a competent Civil Court a declaration of their right to conduct such processions subject to certain

---

*Cr. R.C. No 824 of 1927. 27th January, 1928

(Cr. R.P. No. 733 of 1927)

limitations. In October last, they were, however, prohibited by an order of the District Magistrate passed under S. 144, Criminal Procedure Code, from "taking any procession with music in any street of Nellore where there are mosques." The operation of the order has been extended till 7th February by the Governor in Council "in so far as it prohibits any procession with music within 50 yards of any mosque in Nellore."

Mr. Ethiraj for the petitioners concedes that he cannot contend that it is the duty of the authorities who are responsible for the preservation of the public peace in the town of Nellore to enforce the decree in all circumstances and at all costs. If that be so, *cadit quaestio*. If we are not being asked to lay down that that is their duty, it is difficult to see what we are being asked to say. We are not here to advise the Government what measures they should take to protect the rights of the Hindus or to preserve the public peace at Nellore. The preservation of the public peace is their function and in the performance of that function, it may be necessary for them to override temporarily private rights. To quote the judgment of Sir Charles Turner, C. J., in *Sundaram Chetty and others* v. *The Queen*[1]:

"The first duty of Government is the preservation of life and property, and, to secure this end, power is conferred on its officers to interfere with even the ordinary rights of members of the community. The order of 26th March, 1859, appreciates the distinction between rights which have a primary and rights which have a secondary claim to such protection as the Government can afford; and where the Government cannot protect both classes of rights, it may and it ought to abandon the latter to secure the former. In this view . . . the Government is not bound to deprive some members of the community of the services of the force that is found necessary for the protection of their lives and property to enable others to exercise a right which not only is not indispensable to life or to the security of property, but, in the case assumed, creates an excitement which endangers both."

The position could not have been better stated. Where there is a conflict between the public interest and a private right the former must prevail. The right which the petitioners claim and are entitled, in ordinary circumstances, to exercise has once been enforced by drafting police into the town from seven other districts. If the Government consider that that is the only method by which the right can effectively be enforced, but that it cannot be adopted without danger to the public interest at large, it is not for us to say that they are bound to adopt it or to suggest other means of enforcement as to the efficacy or advisability of

---

1 (1883) I.L.R. 6 M. 203 (F.B.).

F. B.

Visvanadha Rao, *In re.*

which they—and not we—are the proper judges. We decline to interfere and dismiss the petition.

A.S.V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE MADHAVAN NAIR AND MR. JUSTICE REILLY.

Moideen Rowthen .. *Appellant** (*Respt.*)

v.

Miyyassa Pulavar .. *Respondent* (*Petnr.*).

Moideen Rowthen *v.* Miyyassa Pulavar.

Criminal Procedure Code (*V of* 1898), *Ss.* 476, 476-A *and* 476-B—*Refusal by District Munsif to make a complaint—Appeal to District Judge—Order of District Judge making a complaint—Appeal to the High Court—Maintainability.*

No appeal lies to the High Court under S. 476-B of the Criminal Procedure Code against an appellate order of a District Judge making a complaint which the District Munsif refused to make when an application was made to him under S. 476. S. 476-B gives a right of appeal only when a Court has made or refused to make a complaint under S. 476 or 476-A and neither of these two latter sections relate to a complaint made by a Court on appeal from the order of the Subordinate Court refusing to make a complaint.

Muhammad Idris v. *The Crown*, (1924) I.L.R. 6 Lah. 56 followed.

Ranjit Narain Singh v. *Rambahadur Singh*, (1925) I.L.R. 5 Pat. 262 dissented from.

Appeal against the order of the District Court of South Malabar, dated 12th October, 1926 in C.M.P. No. 331 of 1926 preferred against the order of the Court of the District Munsif of Palghat, dated 16th April, 1926 in O.P. No. 21 of 1926.

K. P. M. Menon and *P. S. Narayanaswami Aiyar* for appellant.

M. C. Sridharan for respondent.

The Court delivered the following

Madhavan Nair, J.

JUDGMENTS. *Madhavan Nair, J.*—This Civil Miscellaneous Appeal raises the question whether an appeal lies under S. 476-B of the Code of Criminal Procedure to the High Court from an appellate order of the District Judge making a complaint which the District Munsif refused to make when an application was made to him under section 476.

The facts are briefly these. The appellant was the 1st defendant in O.S. No. 57 of 1925 in the District Munsif's Court, Palghat, and the respondent was the 2nd defendant. The suit was on a promissory-note said to have been executed by both

---

*A. A. O. No. 438 of 1926. 1st December, 1927.

Moideen Rowthen v. Miyyassa Pulavar.

Madhavan Nair, J.

the defendants to the plaintiff. The appellant contended that the suit note was not executed by him. His contention being upheld the suit was decreed against the respondent. The respondent then moved the District Munsif under section 476 of the Code of Criminal Procedure to present a complaint to the Sub-divisional First Class Magistrate of Palghat charging the appellant with having intentionally given false evidence in a judicial proceeding before him. The District Munsif holding that there will not be a reasonable chance of conviction refused to make a complaint. On appeal by the respondent under section 476-B, the District Judge reversed the order of the Lower Court and made a complaint to the Sub-divisional First Class Magistrate holding that

"it is expedient in the interests of justice that an enquiry should be made into the offence of intentionally giving false evidence in a judicial proceeding committed by the appellant in the course of his evidence before the District Munsif of Palghat in O.S. No. 57 of 1925"

Against this order this appeal has been filed by the appellant under section 476-B of the Code of Criminal Procedure.

A preliminary objection is taken that section 476-B of the Code gives a right of appeal only when a Court has made or refused to make a complaint under section 476 or 476-A and that, as neither of these sections relates to a complaint made by a Court on appeal from an order of the Subordinate Court refusing to make a complaint, no appeal will lie to this Court under section 476-B of the Code against the order making such a complaint.

The question has to be decided by examining the provisions of sections 476, 476-A and 476-B of the Code of Criminal Procedure. Shortly stated, section 476 authorises any Civil, Revenue or Criminal Court, where it is of opinion that it is expedient in the interests of justice that an enquiry should be made into certain offences, to make a complaint thereof in writing and it lays down the procedure to be followed in making such a complaint. In any case in which such Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint, section 476-A authorises a complaint to be made by the Court to which such Court is subordinate within the meaning of section 195 (3) and provides that where the superior Court makes such complaint the provisions of section 476 shall apply. Section 476-B provides for appeals. It runs as follows:—

Moideen Rowthen v. Miyyassa Pulavar.

Madhavan Nair, J.

"Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under S 476 or S. 476-A or against whom such a complaint has been made, may appeal to the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may, thereupon, after notice to the parties concerned, direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the Subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly."

The appellant in order to succeed will have to show that he has a right of appeal to this under the provisions of this section. The section first provides in what cases appeals would lie and then it points out what orders the Appellate Court may pass in dealing with the appeals. Under this section a person may appeal when a Court has refused to make a complaint under section 476 or section 476-A or when it has made against him such a complaint, *i.e.*, a complaint under section 476 or 476-A. In other words, it gives the right of appeal only when a Court has made or refused to make a complaint under section 476 or 476-A. A complaint made by a Court on appeal from an order of a Subordinate Court refusing to make a complaint does not fall within either of these sections and, therefore, in the present case, which is one of this description, there can be no right of appeal according to the wording of the section. This view has found favour with the Judges of the Lahore High Court (see *Muhammad Idris* v. *The Crown*[1]); but it is argued that on a proper interpretation of the section this view is untenable, and reliance is placed on the decision in *Ranjit Narain Singh* v. *Rambahadur Singh*[2] which dissents from the decision in *Muhammad Idris* v. *The Crown*.[1] Both the decisions are directly in point.

It is conceded that when an Appellate Court dismisses an appeal against the order of its Subordinate Court refusing to make a complaint or making a complaint under section 476 or when it sets aside in appeal an order making a complaint under section 476, there is no further appeal to a superior Court under section 476-B against any of those orders; but when the Appellate Court sets aside an order of its Subordinate Court refusing to make a complaint and makes a complaint, it is contended that an appeal would lie, because the Appellate Court makes a complaint under section 476 and against such an order making a complaint an appeal would lie to that Court to which the Appellate Court is subordinate. This contention is accepted by the learned Judges of the Patna High Court in *Ranjit Narain Singh* v.

1 (1924) I. L. R. 6 Lah. 56. 2. (1925) I. L. R. 5 Pat. 262

Moideen Rowthen
v.
Miyyassa Pulavar.

Madhavan Nair, J.

Rambahadur Singh.[2] At page 274 the learned Judges observe thus:

" . . . . The District Judge may disagree with the Munsif and himself make a complaint and the complaint then is amenable to the provisions of S. 476; that is to say, it is, under section 476-B subject to appeal to the High Court : for section 476-B reads 'any person against whom a complaint under S. 476 has been made by any Court.'

In the case mentioned the District Judge is making the complaint under section 476: the District Judge's Court is subordinate to the High Court within the meaning of section 195 (3) and, therefore, the appeal lies to the High Court."

The wording of the section does not warrant this interpretation. The complaint which the Appellate Court makes is one under section 476-B, because the provisions of section 476 apply to it, it does not become a complaint under that section attaching to itself the incident of appealability existing in the case of such complaints under the first part of section 476-B. To include by this process of interpretation within the expression "such a complaint" a complaint made by an Appellate Court under section 476-B is to read into the section words which are not in it. I am not prepared to adopt such a construction. I may observe with great respect that the words

"Any person against whom a complaint under section 476 of the Code of Criminal Procedure has been made by any Court"

quoted in *Ranjit Narain Singh* v. *Rambahadur Singh*[2] do not find a place in section 476-B. When the meaning of the section is clear, I do not think it is permissible to construe it in the way suggested by the appellant on the ground that the legislature intends that the person to whose prejudice an order has been made should always have a right of appeal. Section 404 of the Code of Criminal Procedure says that no appeal shall lie from a judgment or order of the Court except as provided for in this Code or by any other law for the time in force. If it was intended that appeals should be allowed against such orders, the legislature would clearly have said so. The policy of the legislature seems to be to allow only one appeal against orders that may be passed under section 476 and not to allow an appeal and a second appeal against such orders. If we accept the construction now suggested, it will lead to the anomaly of having two appeals in this class of cases while in the other cases admittedly only one appeal will lie under the section.

The question whether an appeal would lie to the High Court in a case like the present has not been specifically decided

2. (1925) I.L.R. 5 Pat. 262 at 274.

Moideen Rowthen v. Miyyanna Pulavar.

Madhavan Nair, J.

by any other High Court; but there is an observation in *Somabhai Vallavbhai* v. *Aditbhai Parshottam*[3] which supports the interpretation of the section laid down in *Muhammad Idris* v. *The Crown*.[1] In that case the Subordinate Judge directed under section 476 of the Code of Criminal Procedure that the counter-petitioners before the Court should take their trial before a First Class Magistrate for offences under sections 193, 465, 471 and 209 of the Indian Penal Code. Against the order of the Subordinate Judge an appeal was filed to the Sessions Judge under section 476-B of the Code of Criminal Procedure. The Sessions Judge allowed the appeal and directed that the sanction against the appellants should be withdrawn. From that order directing withdrawal the petitioner filed an appeal to the High Court. In holding that no appeal will lie against such an order, the learned Judges (Sir Norman Macleod, C. J. and Shah, J.), said:

> "That they are clearly of opinion that no appeal lies under the provisions of the Code against an order made by the Court to which the Court making a complaint is subordinate."

This dictum would cover the present case also though it was made with reference to an appeal against the order directing the withdrawal of a complaint under section 476-B.

For the above reasons, we must allow the preliminary objection and hold that no appeal lies to the High Court. The appeal is therefore dismissed with costs. There are no circumstances in the case calling for our interference in revision.

Reilly, J.

Reilly, J.—I agree that the preliminary objection raised by Mr. Sridharan must be upheld and that no appeal lies in this case. Mr. K. P. M. Menon has urged that, if an order is made to the prejudice of any person that a complaint should be made against him, whether the order is made against him originally or on appeal, it is reasonable that one appeal at least should be allowed against that order and we may assume that that was the intention of the legislature in section 476-B, Code of Criminal Procedure. But, even if the wording of that section were so obscure that it were necessary for us instead of trying to apply its literal meaning to speculate as to what would be a reasonable course for the legislature to adopt, it might be urged with at least equal force that, when it has appeared proper to a Court, original or appellate, that such a complaint should be made, it is

1. (1924) I.L.R. 6 Lah. 56. 3. (1924) I.L.R. 48 B. 401.

Moideen Rowthen v. Miyyana Pulavar. — Reilly, J.

reasonable that the person accused should face an inquiry or trial on the complaint without more ado as he would have to do if a complaint of an offence were made against him by a private person, unless the complaint was dismissed under section 203, Code of Criminal Procedure. There is certainly no reason why an accused person should require more protection against the complaint of a Court, which it may be assumed will act after judicial consideration than against the complaint of a private person. But in this matter I do not think that we are justified in entering upon any such speculation. The wording of section 476-B appears to me to be clear. It gives an appeal to "any person on whose application any Court has refused to make a complaint under section 476 or section 476-A and to any person against whom such a complaint has been made." The words "such a complaint" appear to me to mean clearly a complaint made under section 476 or section 476-A. That is their clear grammatical meaning and we cannot suppose that they mean anything else unless we assume that the legislature has done its work in this matter in a very slipshod way, an assumption which we are least of all justified in making when we are interpreting a provision which has been deliberately introduced into the Code by an amending Act. A different view was taken in *Ranjit Narain Singh* v. *Rambahadur Singh*.[2] But though the judgment in that case is long and elaborate, the reasoning in it is, if I may say so with great respect, very scanty and appears to have been affected by what is a serious misquotation from section 476-B. The section does not contain, as the report of this case says that it contains, the words

"any person against whom a complaint under section 476 has been made by any Court."

To my mind the correct interpretation of section 476-B in this matter is that adopted in *Muhammad Idris* v. *The Crown*.[1] There is one other consideration which I may perhaps mention. The first principle of the Code of Criminal Procedure in regard to appeals is that expressed in section 404, *viz.*, that no appeal shall lie unless provided for by the Code or some other law. Bearing that principle in mind we must recognise that none but a most careless legislature could have intended to provide a right of appeal in the Code but have failed to give it in clear, precise and explicit language. The last resort of interpretation is to assume that the legislature has done its work in a careless way, has failed

1. (1924) I.L.R. 6 Lah. 56. 2. (1925) I.L.R. 5 Pat. 262.

Moideen Rowthen v. Miyyasra Pulavar.

Reilly, J.

to say what it means or has said what it does not mean. There is nothing whatever in the present instance to justify us in making such an extreme and exceptional assumption or in supposing that when framing section 476-B the legislature had forgotten a cardinal principle of the Code which it was amending. In my opinion there is no ambiguity about the section in this respect and nothing to justify us in interpreting it otherwise than in its plain, grammatical meaning. I agree, therefore, that this appeal must be dismissed as incompetent.

I agree that this is not a case in which we should interfere in revision, as Mr. Menon requests us to do now that his appeal has been held to be inadmissible.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE JACKSON.

Etathil Chandu Kutti .. *Appellant** (*12th Deft.*)

v.

Viayathen Mahadevi and others .. *Respondents* (*Plff. and Defts.* 1 *to* 8).

Etathil Chandu Kutti v. Viayathen Mahadevi.

Malabar Compensation for Tenants Improvement Act (Madras Act I of 1900), *Ss.* 5 *and* 6—*Kanom—Redemption—Decree for—Ejectment of sub-lessee under—Compensation for improvements due to him—Payment of, into Court to his credit—Condition precedent—Dispute between him and kanomdar as to right to amount.*

In a suit by a landlord to redeem a kanom, disputes existed between the appellant, a sub-lessee under the kanomdar, and the kanomdar himself as to who was entitled to the compensation for the improvements which admittedly existed. The Courts below decreed the suit and directed that the amount in dispute between the appellant and the kanomdar should be paid by plaintiff and kept in Court deposit to be paid out to whoever established his title.

Held that, on the right construction of Ss. 5 and 6 of Madras Act I of 1900, the Courts below must have found to what compensation for improvements the appellant was entitled, and that only after paying that sum into Court to the credit of the appellant, could the plaintiff execute his decree so as to eject the appellant.

Under Madras Act I of 1900 the landlord must deal direct with the person in possession though he may only be a sub-lessee, and that person cannot be ejected till his claim for compensation has been adjudicated upon and the compensation amount found due to him has been paid into Court to his credit.

Second appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A.S. No. 81 of

---

*S.A. No. 284 of 1924. 8th September, 1927.

1923 preferred against the decree of the Court of the Additional District Munsif of Calicut in O.S. No. 581 of 1920.

Etathil Chandu Kutti v. Vlayathen Mahadevi.

T. R. Ramachandra Aiyar and *N. A. Krishna Aiyar* for appellant.

K. P. Ramakrishna Aiyar for respondents.

The Court delivered the following

JUDGMENT.—Second appeal from the judgment of the Subordinate Judge, Calicut, in A.S. No. 81 of 1923, from O.S. No. 581 of 1920, Additional District Munsif, Calicut.

The appellant is a sub-lessee in Malabar holding under a kanomdar. The first respondent, plaintiff, has sued to redeem the kanom, and has obtained a decree. Appellant and the kanomdar are disputing as to who is entitled to the compensation for the improvements which admittedly exist. The District Munsif ordered that the amount in dispute between defendants 1 to 8 and 12 will be paid by plaintiff and kept in Court deposit to be paid out to whoever establishes his title. The Subordinate Judge finds that this direction is obviously right. The plaintiff has accordingly paid the amount in Court. The 12th defendant appeals on the ground that under Madras Act I of 1900 he cannot be ejected from possession until the compensation for his improvements has been ascertained and paid to his credit. The plaintiff contends that, so long as he has deposited the value of the improvements into Court, he has conformed to the Act, and the 12th defendant may be left to fight out his claim for compensation with defendants 1 to 8 after ejectment. The determination of this question is the sole point raised in this second appeal.

Section 5 (1), Act I, 1900, lays down that every tenant shall on ejectment be entitled to compensation for improvements and every tenant to whom compensation is so due shall, notwithstanding the determination of the tenancy or the payment or tender of the mortgage money (if any), be entitled to remain in possession until ejectment in execution of a decree or order of Court. Then section 6 (1) provides:

"In a suit for ejectment instituted against a tenant in which the plaintiff succeeds and the defendant establishes a claim for compensation due under section 5 for improvements, the Court shall ascertain the amount of the compensation and shall pass a decree declaring the amount so found due and ordering that on payment by the plaintiff into Court of the amount so found due and also the mortgage money (if any) the defendant shall put the plaintiff into possession of the land with the improvements thereon."

Etathil Chandu Kutti v. Vlayathan Mahadevi.

And under section 6 (3), the amount of compensation for improvements made subsequent to the date up to which compensation for improvements has been adjudged in the decree shall be determined by order of the Court executing the decree and the decree shall be varied in accordance with such order. It is clear, therefore, that under the statute the tenant is entitled to compensation for improvements, the Court shall ascertain the amount of compensation, shall pass a decree declaring the amount to be due, and the plaintiff shall pay that amount into Court, and then the defendant shall put the plaintiff into possession of the land. If improvements have accrued subsequent to the date of the adjudication of their value the Court executing the decree shall vary the decree accordingly.

It has been held in *Sankaran Nambudripad* v. *Sankaran Nair*[1] that, if the landlord pays compensation as originally decreed, although the tenant may have established a claim for compensation for improvements made subsequent to the date of adjudication, and although that amount has neither been ascertained nor has been paid into Court, and although the decree has not been varied, the landlord may nevertheless eject the tenant and leave him to apply, when no longer in possession, for a modification of the decree. The reasons given for this decision are that section 5 does not make the payment of the compensation a condition precedent to ejectment; and S. 6 (3) does not provide that ejectment shall be stayed until revaluation is made. And if a tenant were allowed to remain in possession until the final determination of the value of improvements he could postpone eviction perpetually by continually making fresh improvements.

As for this last reason, if an Act is so drafted as to allow a loophole for malefactors, it is a circumstance more relevant to the amendment of the Act than to the interpretation of its terms. Moreover, if a tenant began this game he could easily be outstripped by the executing authority as soon as the Court was apprised of what was being done.

As regards the other reasons no doubt section 5 does not make the payment of the compensation a condition precedent to ejectment; it says that a tenant is entitled to compensation on ejectment, but then follows section 6 (1) which is not mentioned in *Sankaran Nambudripad* v. *Sankaran Nair*[1] and

1. (1921) I.L.R. 44 M. 960.

Etathil Chandu Kutti v. Vlayathen Mahadevi.

under which the Court shall ascertain the amount of compensation and shall decree that on payment by the plaintiff into Court of the amount so found due defendant shall put the plaintiff into possession. Here the payment of compensation is clearly made a condition precedent to ejectment. And the compensation mentioned in section 5 covers all the compensation mentioned in section 6. A tenant is as much entitled to compensation for improvements made after the suit as for improvements made before the suit. The decree runs, according to S. 6 (1) so much is due by way of compensation for improvements on payment of which sum into Court by plaintiff, defendant, shall put plaintiff into possession. And if there has been a subsequent increase of value, the decree would presumably be varied under section 6 (3), so much more is due by way of improvements on payment of which sum, etc. This being so, there is no apparent necessity for a provision in section 6 that the decree shall be stayed until revaluation is made. Under the Act the tenant cannot be ejected until plaintiff has deposited in Court the value of the improvements for which the tenant is entitled to compensation. Until that amount has been ascertained and paid, there is no question of executing the decree, much less of staying its execution.

So much is clear; but there is one obscurity in the Act which is the real basis of the decision in *Sankaran Nambudripad* v. *Sankaran Nair*.[1] Section 6 (3) provides for the revaluation of an improvement when such revaluation may be necessary with reference to its condition at the time of ejectment. Therefore, it is argued, the ejectment must be an accomplished fact before the revaluation is made; therefore also the ejectment must be an accomplished fact before improvements made subsequent to the original valuation are valued; therefore the landlord must have been intended to have the right to eject before the ascertainment and valuation of all the improvements to which the tenant is entitled; and therefore except in regard to improvements valued before the decree the provision that the tenant shall not be evicted until the compensation has been paid into Court, is a dead letter. It may be observed that "at the time of ejectment" only refers in section 6 (3) to the revaluation of improvements already valued; the section does not provide for the ascertainment of the value of subsequent improvements at the time of ejectment.

1. (1921) I.L.R. 44 M. 960.

Etathil Chandu Kutti v. Vlayathen Mahadevi.

Another interpretation which is possibly more in conformity with the meaning of the Act is that "necessary with reference to the condition of such improvement at the time of ejectment" means with reference to what value the improvement may have attained at the prospective time of ejectment, and with reference to nothing else; for instance, the tenant cannot plead erroneous valuation at that stage. There are no verbal tenses in the phrase and it seems unnecessary to read into it "condition which such 'improvements' *had* when the ejectment *was* effected" especially when there is no such provision in regard to subsequent improvements and when such a reading ejects a tenant before full compensation has been paid into Court. For that surely is the fundamental principle of the Act, and to re-establish that fundamental principle is the object of this discussion. Because the 1st respondent now goes a step further and contends on the strength of *Sankaran Nambudripad* v. *Sankaran Nair*[1] that not only can the landlord eject the tenant without ascertaining the value of improvements due to the tenant which has accrued after the decree, but even without ascertaining the value of improvements due to the particular tenant which has accrued before the decree. "Payment of compensation is not a condition precedent to ejectment." It is argued that any other interpretation would be manifestly unfair to the landlord. He is not concerned with the quarrel between the sub-lessee who is in possession and claims compensation and the kanomdar who claims compensation for the same improvements. So long as the landlord pays into Court the improvement value, the tenant (the sub-lessee) can be ejected without any payment to him and the Court need not ascertain the amount due to that tenant who can be left to litigate about it with the kanomdar in a subsequent suit. This may be a fair interpretation from the landlord's point of view, but it would be dangerous to approach a Malabar statute with any pre-conceived idea that the landlord's view is likely to accord with the intention of the legislature.

Act I, 1900 is an act for protection of tenants and was intended to ensure that the value of any tenant's improvement should be paid into Court to his account before his ejectment. Section 6 (1) is quite clear. In a suit for ejectment instituted against a tenant, as here, where plaintiff seeks to eject 12th defendant, the tenant may claim compensation for improve-

1. (1921) I.L.R. 44 M. 960.

Etathil Chandu Kutti v. Viayathen Mahadevi.

ments. The Court must then see if that claim is established. It cannot refuse jurisdiction in the matter, but must find if the tenant in possession is or is not entitled to compensation and decree accordingly. It may be vexatious for the landlord to be kept waiting while his direct tenant or kanomdar is disputing with a sub-tenant with whom the landlord has no concern; but such vexation must have been contemplated when a sub-lessee was made a tenant under section 3 (1) of the Act. Otherwise, of course, evasion would have been too easy. A landlord need only have let out his lands to the actual tenant through an intermediary and then could have ejected that tenant with no payment to him of compensation value, leaving him to fight out a claim with the intermediary after ejectment. Now, under the Act, the landlord must deal direct with the person in possession though he may only be a sub-lessee, and that person cannot be ejected till his claim for compensation has been adjudicated upon and the compensation amount found due to him has been paid into Court to his credit.

The general principle is affirmed by a Full Bench of this Court in *Vasudevan Nambudripad* v. *Valia Chathu Achan*,[2] probably the first occasion when Act I, 1900, came up for consideration. The tenant in Malabar is "absolutely entitled to make improvements and to receive compensation for them when turned out of his holding."

The decision in *Manian* v. *Kuthira Vattath Raman*[3] does not affect this principle. There, the landlord lawfully got into possession under the decree as it stood, and it was held that subsequent modification on appeal did not make his possession unlawful. The appeal is, therefore, allowed. The Lower Appellate Court is directed to find to what compensation for improvements the tenant-appellant is entitled, and only after paying that sum into Court to the credit of the appellant can the first respondent execute his decree so as to eject the appellant. The lower Appellate Court may refer the matter to the Original Court with liberty to adduce evidence. Two months are allowed for the return of the finding, and one week is allowed for filing objections.

No other point was raised and the decree of the Lower Court is otherwise confirmed though, of course, there may be modification under section 6 (3), Act I of 1900.

2. (1900) I.L.R. 24 M. 47: 10 M.L.J. 321 (F.B.).
3. (1920) 41 M.L.J. 15.

Etathil Chandu Kutti v. Vlayathen Mahadevi.

The appellant raised unnecessary pleas which even questioned the 1st respondent's right of redemption. The appellant is not, therefore, entitled to costs, but I cannot hold that 1st respondent was altogether an unnecessary party because she would wish to defend, and has defended, her right immediately to execute her decree. Therefore, I do not give her costs either.

This second appeal came on for final hearing on the 9th August, 1927, after the return of the finding of the Lower Court.

The Court delivered the following

JUDGMENT.—The sum awarded in the finding may be added to the amount already allowed by the 1st Court. Decree in favour of the 12th defendant. Costs to the 12th defendant from defendants 1 to 8.

A.S.V. *Appeal allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

PRESENT:—VISCOUNT SUMNER, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Rajah Bejoy Singh Dudhoria .. *Appellant** (*Plff.*)

v.

Surendra Narayan Singh and others .. *Respondents* (*Defts.*).

P. C.

Rajah Bejoy Singh v. Surendra Narayan Singh.

Lease—Construction—Patni lease of zemindari lands granted by Zamindar—Lessee's rights under—Soil of lands leased—Property in—Transfer of, or creation of leasehold interest only—Words "Including all interests therein"—Use of—Effect—Excavation of soil for making bricks—Lessee's right of—Injunction against lessee in event of unauthorised user—Lessor's right to sue for—Lease made in accordance with terms of Reg VIII of 1819—Effect—Minerals—Clay used for making of bricks if within meaning of—Perpetual lease—No annihilation of lessor's interest under.

Under the terms of a patni lease granted by the predecessor-in-title of the plaintiff, a Zamindar, eight tarafs, with exception of the grantor's Brohmottur and other Lakhiraj properties, constituting the entire zemindari, including all interests therein, and Jalkar, Bankar, Fulkar, Beels and Jhils were settled with the 1st defendant's predecessor at the annual jama of Rs. 11,000, exclusive of certain charges and expenses therein specified; a premium of Rs. 13,000 was paid in respect of the lease. The grant to the lessee was described as a "Muffasil Patni Taluk Lease according to the provisions of Regulation VIII of 1819."

---

*P.C. Appeal No. 51 of 1927. 12th June, 1928.

P. C.

Rajah Bejoy Singh v. Surendra Narayan Singh.

The lease provided for the payment of the rental by certain specified instalments, and that, on breach of the instalments, the Zemindar should, according to the provisions of Regulation VIII of 1819, realise by attachment and sale of the patni interest the arrears, together with interest for default of instalment and costs. It contained further provision that in the event of non-realisation of the said rents, interest and costs by the sale of the patni interest, the same might be realised by the sale of the lessee's moveable and immoveable properties. The lease contained the following clause:—"I shall not cut the trees myself, nor shall allow anybody else to cut them. In the case of cutting down trees other than timber trees and non-fruit-bearing trees, I shall give you information beforehand, and, on obtaining a letter, shall cut them down. And without a sanad signed by you, I shall not excavate a tank myself, nor shall permit anybody else to do so."

The lease provided that the lessee should possess and enjoy the patni mahal down to sons and sons' sons, etc., on payment of the rents thereof.

Held that, on the true construction of the lease, (1) there was no transfer of the property in the soil and the intention of the parties was that the grantee should be a leaseholder only, and (2) the grantee had no right to use the lands leased for making bricks and causing substantial damage thereto.

Held further, that, in the event of the grantee or his assigns using the subject of the lease in a way not contemplated by the grant, the plaintiff had a right to sue for an injunction restraining such user and that the [illegible] that the lease was made in accordance with the terms of Regulation VIII of 1819 was no bar to his right to do so.

The expression "including all interests therein" in the lease does not increase the corpus of the subject of the lease.

A man who, being the owner of land, grants a lease in perpetuity, carves a subordinate interest out of his own and does not annihilate his interest. This result is to be inferred from the word "lease", which implies an interest still remaining in the lessor.

Quaere : Whether clay used for the making of bricks would come within the meaning of the word "minerals".

Appeal No. 51 of 1927 from a judgment and decree, dated the 26th February, 1925, of the High Court, Calcutta (Walmsley and Chakravarti, JJ.), reversing a judgment and decree, dated the 31st July, 1922, of the Subordinate Judge of Murshidabad. The material facts of the case appear sufficiently from their Lordships' judgment. The case in the High Court is reported in I.L.R. 52 Cal. 655; 89 Indian Cases 785; 41 Calcutta Law Journal 527.

Dunne, K. C. and *Raikes* for appellant.

De Gruyther, K. C. and *Dube* for respondents.

12th June 1928. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—This is an appeal by the plaintiff in the suit from a judgment and decree of the High Court

P. C.

Rajah Bejoy Singh v. Surendra Narayan Singh.

Sir Lancelot Sanderson.

of Judicature in Bengal, dated the 26th February, 1925, by which the decree of the learned Subordinate Judge of Murshidabad was reversed and the plaintiff's suit was dismissed.

The plaintiff is the zemindar of the land, in respect of which the suit was brought, and the first defendant, Surendra Narayan Singh, is the assignee of a patni lease of the said land, which the plaintiff's predecessor in title granted on the 18th of July, 1853.

The other defendants are the lessees, to whom the first defendant's predecessor sub-let part of the land, which was the subject of the patni lease, for the purpose of making bricks.

The learned Subordinate Judge granted a permanent injunction restraining the defendants from making excavations in the lands of the mahal for the purpose of making bricks, and directed that the first defendant should pay the sum of 10 rupees to the plaintiff as damages. It was further ordered that the first defendant should pay an amount, specified in the decree, in respect of the plaintiff's costs. The defendants 1, 2 and 3 appealed to the High Court, which allowed the defendants' appeal and dismissed the plaintiff's suit.

The plaintiff filed a cross-objection, which related to the amount of damages. This cross-objection was dismissed, and it was further ordered that the plaintiff should pay the defendant-appellants' costs of the appeal and of the trial.

The main point which has been argued on this appeal is that which was raised by the fourth issue, viz., "Have the defendants the right to use the lands of the mahal for the purpose of making bricks?"

The plaintiff contended that the defendants had no right to make excavations in the land for the purpose of making bricks, and thereby to cause substantial damage, whereas the defendants contended that they had such right.

It appears from the terms of the patni kabuliyat of the 18th July, 1853, that eight tarafs, with the exception of the former zemindar's Brohmottur and other Lakhiraj properties, constituting the entire zemindari, including all interests therein, and Jalkar, Bankar, Fulkar, Beels and Jhils were settled with the first defendant's predecessor, at the annual jama of Rs. 11,000, exclusive of certain charges and expenses therein specified; a premium of Rs. 13,000 was paid in respect of the lease. The grant to the lessee was described as a "Muffasil Patni Taluk Lease according to the provisions of Regulation VIII of 1819."

The lease provided for the payment of the rental by certain specified instalments and that, on breach of the instalments,

P. C.

Rajah Bejoy Singh v. Surendra Narayan Singh.

Sir Lancelot Sanderson.

the zemindar should, according to the provisions of Regulation VIII of 1819, realise by attachment and sale of the patni interest the arrears, together with interest for default of instalment and costs. It contained further provision that, in the event of non-realisation of the said rents, interest and costs by the sale of the patni interest, the same might be realised by the sale of the lessee's moveable and immoveable properties.

The lease contained the following clause:—

"I shall not cut the trees myself, nor shall allow anybody else to cut them. In the case of cutting down trees other than timber trees and non-fruitbearing trees, I shall give you information beforehand, and, on obtaining a letter, shall cut them down. And without a sanad signed by you, I shall not excavate a tank myself, nor shall permit anybody else to do so."

It was provided that the lessee should possess and enjoy the patni mahal down to sons and sons' sons, etc., on payment of the rents thereof.

It was argued on behalf of the plaintiff-appellant that the clay used for the making of bricks must be regarded as a mineral, and that the patni lease did not carry a right to the minerals in view of the fact that there was no express grant of the minerals in the lease. Reliance was placed upon the decision in *Sashi Bhushan Misra* v. *Jyoti Prashad Singh Deo*,[1] and particularly upon a passage in the judgment at page 53, which is as follows:

"These decisions, therefore, have laid down a principle which applies to and concludes the present dispute. They establish that, when a grant is made by a zemindar of a tenure at a fixed rent, although the tenure may be permanent, heritable and transferable, minerals will not be held to have formed part of the grant in the absence of express evidence to that effect."

It was, however, argued on behalf of the respondents that the above-mentioned decision was not given with reference to such a patni taluk lease, as is under consideration in this appeal, and reference was made to the case of *Satya Niranjan Chakravarti* v. *Ram Lal Kaviraj*,[2] in which it was held that, so far as direct decision of the Board is concerned, the question whether a patni tenure, without more said, transfers all the rights of the zemindar, including the right to the minerals, is still open, and that the question depended upon what is the true nature of a patni tenure. Their Lordships in that case referred to the passage in the judgment in *Sashi Bhushan Misra* v. *Jyoti Prashad Singh Deo*,[1] which has been quoted above, and stated that

1. (1916) L.R. 44 I.A. 46: 32 M.L.J. 245 (P.C.).
2. (1924) L.R. 52 I.A. 109 : 48 M.L.J. 328 (P. C.)

P. C

Rajah Bejoy Singh v. Surendra Narayan Singh.

Sir Lancelot Sanderson.

"That only means that the mere fact of a lease being permanent, transferable and heritable does not necessarily carry with it the result that the lessee has all zemindari rights"

It was contended on behalf of the respondents that under the grant of 18th July, 1853, all the interest which the grantor had in the land passed to the grantee, that under the Regulation VIII of 1819 there was no right of re-entry or forfeiture for failure to pay the rent, and that the only means of realising arrears of rent was a sale by public auction in accordance with clause 3 (3) of the above-mentioned regulation.

On the other hand, it was argued on behalf of the appellant that the grant did not pass the property in the soil, but only entitled the grantee to possession as long as he continued to pay the rent and perform the conditions stipulated in the grant; that the grantee was a leaseholder only, and that the terms of the lease must be construed in order to ascertain what was the subject and the extent of the grant, and that upon the true construction of the lease the right to excavate the soil for the purpose of making bricks was not included in the grant.

The question, therefore, to be considered is, what is the nature and extent of the grant in this case? As already stated, the description in the grant of 18th July, 1853, is "a Muffasil Patni Taluk Lease according to the provisions of Regulation VIII of 1819."

The preamble to the said regulation refers, among other matters, to the liberty and privilege of zemindars, paying revenue to Government, to grant "taluks or other leases, fixing rent in perpetuity at their discretion." A further recital mentions the fact that, in the exercise of this privilege, a tenure which was called "patni tenure" had been created by certain zemindars, and that it had become necessary to define the nature of the property given and acquired on the creation of a patni taluk as above described, and to fix the process by which the said tenures are to be brought to sale for arrears.

In clause 2 it was declared that leases fixing rent in perpetuity, or for a longer term than 10 years, were valid.

Clause 3 is as follows:

"3. *First.*—The tenures known by the name of putnee talooks, as described in the preamble to this Regulation, shall be deemed to be valid tenures in perpetuity, according to the terms of the engagements under which they are held. They are heritable by their conditions; and it is hereby further declared that they are capable of being transferred by sale, gift or otherwise, at the discretion of the holder, as well as answerable for

his personal debts, and subject to the process of the Courts of Judicature, in the same manner as other real property.

"*Second*—Putnee talookdars are hereby declared to possess the right of letting out the lands composing their talooks in any manner they may deem most conducive to their interest, and any engagements so entered into by such talookdars with others shall be legal and binding between the parties to the same, their heirs and assignees· provided, however, that no such engagements shall operate to the prejudice of the right of the zemindar to hold the superior tenure answerable for any arrear of his rent, in the state in which he granted it, and free of all incumbrance resulting from the act of his tenant"

"*Third.*—In case of an arrear occurring upon any tenure of the description alluded to in the first clause of this section, it shall not be liable to be cancelled for the same, under the rule contained in the seventh clause of section 15, Regulation VII, 1799, for leases conveying a limited interest in the land; but the tenure shall be brought to sale by public auction, and the holder of the tenure will be entitled to any excess in the proceeds of such sale, beyond the amount of the arrear of rent due; subject, however, to the provisions contained in section 17 of this Regulation."

For the purpose of ascertaining the nature of a "taluk" reference was made to Regulation VIII of 1793, clauses 5 and 7. It appears from the said clauses that a talukdar may be the actual proprietor of the land, or he may be a leaseholder only. and he is the latter if the taluk is held under a writing in sanad from a zemindar which does not expressly transfer the property in the soil, but only entitles the talukdar to possession so long as he continues to discharge the rent or perform the conditions stipulated therein.

Their Lordships are of opinion that the terms of the grant of 18th July, 1853, show that there was no transfer of the property in the soil and that the intention of the parties was that the grantee should be a leaseholder only.

It was, however, argued on behalf of the respondents that, even if the grant were considered as a lease, the plaintiff's predecessor, after the grant had been made, had no interest in the land or in the way in which it was used; that his only right was to receive the rent, and in default of payment to bring the patni tenure to sale in the manner prescribed in Regulation VIII of 1819, and consequently the plaintiff's suit would not lie.

Their Lordships are not able to accept that argument.

A man who, being the owner of land, grants a lease in perpetuity, carves a subordinate interest out of his own and does not annihilate his interest. This result is to be inferred

P. C

Rajah Bejoy Singh v. Surendra Narayan Singh.

Sir Lancelot Sanderson.

from the word "lease," which implies an interest still remaining in the lessor. See *Abhiram Goswami* v. *Shyama Charan Nandi.*[3]

The grant of 18th July, 1853, was clearly a lease and the intention of the parties is to be gathered from the terms of the grant, and if it be found that the grantee or his assigns is using the subject of the lease in a way not contemplated by the grant, the fact that it was made in accordance with the terms of Regulation VIII of 1819 is not sufficient to prevent the plaintiff from suing for the purpose of obtaining an injunction to restrain such user.

The question still remains, what was the subject of the lease ?

It was contended on behalf of the respondents that the terms of the lease, and especially the words "the entire zemindari, including all interests therein," show that it was intended to grant a lease not only of the surface of the land, but also of the sub-soil, with a right to use the same for any purpose which the grantee wished, even if such user caused substantial damage to the subject of the lease.

In their Lordships' opinion, the expression "including all interests therein" does not increase the corpus of the subject of the lease.

In *Giridhari Singh* v. *Megh Lal Pandey*[4] it was held that the expression "with all rights," which was amplified as meaning "with all right, title and interest," only gave expressly what might otherwise quite well have been implied, viz., that the corpus, being once ascertained, there will be carried with it all rights appurtenant thereto, including not only possession of the subject itself, but, it may be, of rights of passage, water or the like which enure to the subject of the lease and may even be derivable from outside properties.

In that case attention was drawn to the point that the essential characteristic of a lease is that the subject is one which is occupied and enjoyed and the corpus of which does not in the nature of things and by reason of the user disappear.

In their Lordships' opinion the intention of the parties as to what was the subject and extent of the lease must depend upon the true construction of the terms of the grant of 18th July, 1853.

It contains no reference to minerals or to the sub-soil, or to the right to excavate for making bricks. There is nothing in

3. (1909) L.R. 36 I.A. 148 at 167: 19 M.L.J. 530 (P.C.).
4. (1917) L.R. 44 I.A. 246 at 250: 33 M.L.J. 687 (P C).

P. C.

The Karnani Industrial Bank, Limited v. Satya Niranjan Shaw.

Where the contractual rent has been paid for a portion of the period of the tenancy and the sum so paid has become irrecoverable by the lapse of six months from the date of the last payment, the landlord is entitled to hold the sum so paid for the contractual rent, and rent on the basis of the standard rent will only run from after the date up to which the contractual rent has been so paid. In such a case the tenant is not entitled to be debited with the standard rent from the beginning of the tenancy.

Appeal No. 13 of 1927 from a judgment and decree, dated the 19th June 1925, of the High Court, Calcutta (Greaves and B. B. Ghose, JJ.), reversing an order, dated the 31st January, 1925, of the President, Calcutta Improvement Tribunal.

The facts of the case appear sufficiently from the judgment of their Lordships. The case in the High Court is reported in 93 Indian Cases 56.

W. A. Greene; K. C. and *Dube* for appellants.

De Gruyther, K. C. and *Parikh* for respondents.

14th June, 1928. Their Lordships' judgment was delivered by

Lord Atkin.

Lord Atkin.—These two appeals from the High Court at Fort William in Bengal raise a question as to the construction of the Calcutta Rent Act, 1920. On October 7, 1920, the appellants, hereinafter called the Bank, took a lease from the respondents, hereinafter called the landlords, of premises 3 and 4, Royal Exchange Place, Calcutta, for a term of three years from November 1, 1920, at a rent of Rs. 5,400 a quarter, payable in advance. The premises at the time appear to have been let in tenements at monthly rents. In the lease there were stringent repairing covenants, under which the Bank were to put the premises in substantial repair, expending at least Rs. 10,000 and to keep them in good repair. They were to eject such of the occupiers as they desired at their own risk and expense. There was the usual forfeiture clause, and the Bank had an option to renew for a further term of three years. The Bank were not able to evict the occupiers, and apparently took no steps to perform the repairing covenants. They paid the rent up to August 1, 1922, and no further. On August 15, 1923, the landlords served the Bank with notice to determine the lease for breach of the repairing covenant, and on September 10, 1923, they instituted proceedings in ejectment, claiming possession, arrears of rent up to August 15, 1923, mesne profits and damages for breaches of covenant. On December 1, 1923, the Bank made application under section 15 of the Rent Act of 1920 to the Controller appointed under the Act to fix the standard rent of the

P. C.
The Kamani Industrial Bank, Limited v. Satya Niranjan Shaw.
Lord Atkin.

premises and to grant a certificate of the standard rent. On December 13, 1923, the landlords filed a counter-statement. On March 11, 1924, the Controller fixed the standard rent at Rs. 1,420 per mensem and granted his certificate accordingly.

On March 22, 1924, the landlords appealed from the order of the Controller to the President of the Improvement Tribunal pursuant to section 18 of the Rent Act, and on March 24th the Bank also appealed to the President, seeking to have the standard rent fixed at a lower sum.

The Rent Act of 1920 was only to be in force for three years from May 5, 1920, but by the Calcutta Rent Amendment Act of 1923 it was extended to the end of March, 1924. By the Calcutta Rent Amendment Act of 1924 it was further extended to the end of March, 1927, with a proviso that after March 31, 1924, it should cease to apply to any premises the rent of which exceeded Rs. 250 a month or Rs. 3,000 a year on November 1, 1918.

The appeals before the President were adjourned for divers reasons from time to time until January 31, 1925, when he dismissed both appeals on the ground that the Act of 1920 had ceased to apply to the premises, and therefore he had no jurisdiction. It is admitted that this decision was wrong in law, the contrary having been decided by this Board in *Keshoram Poddar* v. *Nundo Lal Mullick*.[1]

On February 23, 1925, the landlords applied to the High Court under section 115 of the Civil Procedure Code to revise the order of the President on two grounds: (1) that he had wrongly refused jurisdiction; (2) that the whole of the proceedings before the Controller were *ultra vires* and void by reason of the tenancy having determined before the application to him. A rule *nisi* was granted and the hearing stood over until the hearing of the ejectment suit. That suit was heard by Ghose, J., on April 24, 1925. He held that the lease was determined on August 15, 1923, and that the Bank had given up possession on January 24, 1924. He gave judgment for mesne profits from August 15, 1923 to January 24, 1924, measured by the standard rent fixed by the Controller of Rs. 1,420 per mensem. He gave judgment for the damages for breach of covenant to repair, with a reference to the Registrar to assess the amount. As to the claim for arrears of rent, the Bank had since the action was brought, paid to the landlords the sum of Rs. 9,770, being the

1. (1927) L.R. 54 I.A. 152: 53 M.L.J. 655 (P.C.).

P. C

The Karnani Industrial Bank, Limited v. Satya Niranjan Shaw.

Lord Atkin.

amount which added to the rent in fact paid up to August 1, 1922, at the contractual rate, satisfied the rent due up to August 15, 1923, on the footing that the standard rent, Rs. 1,420 per mensem, had been payable by the Bank from the commencement of the term. The learned Judge thought this sufficient and made no order for payment of arrears of rent. On June 19, 1925, the High Court (Sir Wm. Greaves and Ghose, J.), heard the argument on the rule *nisi* and gave judgment setting aside the order of the Controller on the ground that he had no jurisdiction, as at the time of the application the applicants (the Bank) had ceased to be tenants. On July 4, 1925, the Bank appealed to the Court of Appeal from the judgment in the ejectment suit, and on August 3, 1925, the landlords cross-appealed. On April 27, 1926, the Chief Justice and Rankin, J., heard the appeal. They dismissed the Bank's appeal and allowed the cross-appeal by giving judgment for arrears of rent on the footing of the contractual rent, and directing that mesne profits should be calculated at the same rate. This decision necessarily followed from the order of the High Court setting aside the certificate of the Controller. There is now no complaint in respect of it except that if the Bank succeed in restoring the Controller's certificate the figures as to rent and mesne profits must necessarily be adjusted.

In the result, therefore, the appeals depend upon the question whether the High Court were right in deciding that the Controller had no jurisdiction to make the order in question certifying the standard rent at Rs. 1,420 per mensem.

The Act of 1920, reciting by way of preamble that it is expedient to restrict temporarily the increase of rents in Calcutta, makes provision for achieving that object. By section 4, where the rent of any premises is during the continuance of the Act increased so as to exceed the standard rent, the amount of such excess is, notwithstanding any agreement to the contrary, to be irrecoverable. The standard rent is the rent at which the premises were let on November 1, 1918, or if first let after November 1, the rent at which first let, or, in the cases specified in section 15, the rent fixed by the Controller. By section 14, if any sum has been paid on account of rent which is by the Act irrecoverable, such sum shall within six months after the date of payment be recoverable by the tenant by whom it was paid from the landlord who received the payments. It appears to their Lordships to be obvious that this section is intended to

P. C.

The Karnani Industrial Bank, Limited v. Satya Niranjan Shaw.

Lord Atkin.

give relief to any person who, having been a tenant, comes within the period of limitation to assert his claim to recover excessive rent paid, whether at the time he claims he is actually a tenant or not. If it were otherwise the exorbitant landlord who had succeeded in obtaining the excessive rent could relieve himself of his liability by determining the tenancy, which in the case of poor tenants holding on a month's tenancy could easily be done. There seems no reason why the tenant whose tenancy has expired by notice or by effluxion of time should lose the benefit of the section, and the words of the section, "tenant by whom it was paid," and "landlord who received the payment," appear to their Lordships to indicate that a change in the relations of a tenancy was contemplated by the Legislature.

Moreover, by section 4, rent in excess of the standard rent is irrecoverable by the landlord. This must mean irrecoverable at any time by any process. It seems inconceivable that while the landlord is debarred from recovering excessive rent from an actual tenant, whether by distress or action, yet if a tenancy expires by notice or effluxion of time the landlord may recover the full excessive rent from his ex-tenant.

These considerations show that, if full effect is to be given to the provisions of section 4 and section 14, it will be necessary for ex-tenants as for actual tenants to have facilities for determining what is the standard rent by which the excess is to be measured.

Section 15 provides machinery by which the standard rent is to be ascertained, and in the cases mentioned in sub-section (3) the only machinery by which it is to be ascertained. By sub-section (1) the Controller shall, on application made to him by any landlord or tenant, grant a certificate certifying the standard rent of any premises leased or rented by such landlord or tenant. This is a duty imposed on the Controller. Sub-section (3) provides:

"In any of the following cases the Controller may fix the standard rent at such amount as, having regard to the provisions of this Act and the circumstances of the case, he deems just. (a) Where by reason of any premises having been let at one time as a whole and at another time in parts, or where a tenant has sub-let a part of any premises let to him or where for any reason any difficulty arises in giving effect to this Act; (b) provides for difficulties which may arise where premises are let furnished; (c) for cases where the premises at any time have been let for a nominal consideration or a consideration in addition to rent; (d) for cases where the rent on November 1, 1918, was, in the opinion of the Controller, unduly low; (e) for cases where there has been a change in the condition of any premises or an increase in municipal rates and subsequent to the standard rent having been fixed."

P. C.

The Karnani Industrial Bank, Limited v. Satya Niranjan Shaw.

Lord Atkin.

so paid for the contractual rent, and rent on the basis of the standard rent, whatever it may be, will only run from August 1, 1922, and must be calculated accordingly.

Their Lordships, therefore, are of opinion that the decree of the High Court on the rule for revision, dated June 19, 1925, should be discharged with costs, and the order of the President of the Tribunal be set aside. The parties will be at liberty to proceed with their appeals to the President of the Tribunal if so advised. The decree of the High Court on appeal in the ejectment suit should be discharged, except so far as it affirms so much of the original decree dated April 24, 1925, as awarded damages for breach of covenant. This case should be remitted to the High Court to take such steps as are necessary to carry out their Lordships' opinion. When there is a final determination of the standard rent the original decree may have to be revised by giving the respondents a decree for arrears of rent on the footing that the rent paid up to August 1, 1922, must be treated as due and is not to be adjusted. The appellants must have the costs of these appeals and of the rule and the appeal thereon. The costs of the ejectment suit in the Indian Courts will be dealt with by the High Court.

Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants: *Clarke, Rawlins & Co.*

Solicitors for respondents: *Downer and Johnson.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE SRINIVASA AIYANGAR.

Bonthi Damodharam Chetti, minor by his mother and guardian Bonthi Ethirajan .. *Appellant**

v.

Bansilal Abeerchand, Rai Bahadur and others .. *Respondents.*

Damodharam Chetti v. Bansilal Abeerchand.

Hindu Law—Joint family—Mortgage by—Validity—Family business—Purchase of goods on credit for—Mortgage for price of, before expiry of credit period allowed—Debt not demandable or enforceable at law if due and payable—Debtor and creditor—Appropriation of payments—Rule as to—Floating account—Security furnished in case of, to cover maximum—Maximum drawn by debtor—Payments in by debtor subsequently—Appropriation of—Intention of parties—Presumption—Reduction of maximum or

*O.S.A. No. 126 of 1925. 21st December, 1926.

Damodharam Chetti v. Bansilal Abeerchand.

keeping down of interest—Hindu Law—Family trade or business—Test—Purchase and sale of different commodity if outside scope of—Grandfather—Business carried on by, stopped for some years before his death and started by father some time afterwards if a family business—Hindu father of trading community—Starting of new business by, as family business—Power of.

A debt may be both due and payable even though not demandable or enforceable at law.

1st defendant, who was conducting a joint family business, purchased goods on credit for the purpose of the business. Before the expiry of the credit period, he executed a mortgage of joint family property for the price payable for the goods purchased. It appeared that the credit period signified merely that the price payable carried interest at the rate that might be stipulated from the expiry thereof and that if the purchaser made the payment earlier he was entitled to a discount also at a stipulated rate calculated proportionately for the unexpired period of credit before which the payment was made.

Held, that the mortgage was binding on the share of the undivided son of the 1st defendant in the property.

The principle of the decision in *Bandhu Ram* v. *Ramkishun Sonar* [(1923) 21 A.L.J. 354] that a sale of family property by the father to discharge a mortgage-debt which is not payable till long after is invalid is inapplicable to a case of sale made to discharge a trade-debt with a credit period for payment of the same.

In the case of a floating account where security is intended to cover the maximum contemplated by the parties, it is not possible that, after the maximum amount is once borrowed and drawn, subsequent payments in, can be regarded as payments made to reduce the maximum amount of liability without any reference to or any contemplation of subsequent drawings or borrowings.

The rule as to appropriation of payments is only a rule based on the intention of parties, actual or presumed or even imputed. Accordingly the payments made by a debtor who has already drawn the maximum amount cannot be attributed to any intention on his part either to reduce the maximum available or even permanently to reduce the liability, but is only ascertainable to keep down the interest and make the amount available for being drawn out again.

Too narrow a construction ought not to be placed on the expressions "family trade or family business". Accordingly, in a case in which a family business consisted in the purchase and sale of one commodity, purchase and sale of another commodity cannot be held to be outside the scope of the family business. Generally speaking, each case must be determined only with regard to its particular facts, and the question to be determined in each case should be whether having regard to the recognised business, profession means of livelihood or what is called the "Kulachara" of the family, the particular enterprise or embarking was only within the reasonable limits of the exercise thereof, or, really, having regard to its nature or extent, a new speculative enterprise.

Held, that the mere circumstance that a business carried on by a Hindu was stopped for a few years before his death was not sufficient to make

Damodharam Chetti v. Bansilal Abeerchand.

a similar business started by his son some time afterwards any the less a family business.

Dictum of Sadasiva Aiyar, J., in *The Official Assignee of Madras* v. *Palaniappa Chetty* [(1918) I.L.R. 41 M 824 at 835: 35 M.L.J. 473] to the effect that a Hindu father belonging to a trading community has a right to begin a lawful and ordinary trade business as a joint family business in which himself and his minor sons were partners approved.

On appeal from the judgment and decree of the Hon'ble Mr. Justice Krishnan, dated 25th August, 1925 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C.S. No. 493 of 1924.

V. Masilamani Pillai for appellant.

V. C. Gopalaratnam for respondents.

The Court delivered the following

JUDGMENT.—The suit from which this appeal arises was instituted by the 1st respondent to recover the amount due under an equitable mortgage made by deposit of title deeds and evidenced by a registered instrument. The amount to secure which the equitable mortgage was made had admittedly been advanced to a business carried on in partnership by defendants 1 to 3, the original defendants in the action.

The property over which the equitable mortgage was given as security belonged, however, to the first defendant or his family. The 4th defendant in this suit, the appellant before us, was added as a party on his own application apparently with a view to have determined in this action itself the question whether or not the equitable mortgage made by the 1st defendant was binding on his half share in the property.

It has thus come about that the pleadings in the case, so far as the liability of the 4th defendant was concerned, were not as accurate as otherwise they might have been. On behalf of the 4th defendant, it being denied that the mortgage was binding on him, the parties went to trial on that issue generally, and Mr. Justice Krishnan, who tried the case, found it was so binding and granted a decree accordingly. It is from that judgment that the 4th defendant has filed the present appeal.

In appeal it has been contended before us that the learned Judge was wrong in holding that the mortgage was binding on the 4th defendant's share in the property. The argument was based on two grounds by the learned vakil for the appellant. The first was that the property, the subject of the mortgage, being admittedly joint family property of the 1st and 4th defendants, the 1st defendant had no right to alienate the property

Damodharam Chetti v. Banslal Abeerchand.

inclusive of the son's share except for purposes properly binding on the family or for *bona fide* antecedent debts of his own. It was contended that, at the time when the suit mortgage was created, though there was a personal debt of the 1st defendant for goods purchased for the business to the extent of Rs. 25,000, still that debt had not yet become payable, the goods having been purchased on credit and the credit period of seventy days not having then expired.

It was argued that if goods should be purchased by a person on credit there is no debt due till the expiry of the credit period. This argument was obviously due to a confusion between debts due and debts due and demandable. A debt may conceivably be both due and payable even though not demandable or enforceable at law. It is, however, well known that in the piece-goods market at Madras the seventy days' credit generally signifies merely that the price payable carries interest at the rate that may be stipulated from the expiry of seventy days, and that if the purchaser should make the payment earlier he would be entitled to a discount also at a stipulated rate calculated proportionately for the unexpired period of credit before which the payment is made. The contention, therefore, cannot be accepted that there is no debt due by the father before the expiry of the credit period and in any case it would have been obviously to the interest of the first defendant to pay up the amount due even before the expiry of the credit period and earn a discount.

The learned vakil for the appellant referred in this connection to the case of *Bandhu Ram* v. *Ramkishun Sonar*.[1] It was held in that case that the amount secured by a mortgage not being payable for some considerable time could not be regarded as a pressure on the estate or the family so as to justify an immediate alienation for the purpose of discharging it. But a trade debt cannot possibly be regarded in the same light and more especially when it is really payable even though not demandable and when on such payment being made proportionate discount can also be obtained.

The second contention argued on behalf of the appellant was that the amount now sued to be recovered was really not the original debt of Rs. 15,000 borrowed for paying off an antecedent debt of the father but represents only moneys borrowed subsequently from time to time by the father and that, as regards the purposes for which these later amounts were

1. (1923) 21 A.L.J. 354.

borrowed, there is no evidence whatever on behalf of the plaintiff or on the record to show that they can be regarded as debt borrowed for paying off any antecedent debts. There is no doubt some room for such a contention. But at the same time it must be remembered that the appellant became a party to the suit on his own application and it was only on the pleas raised by him that the issues were raised. In this connection it must be observed that on behalf of the fourth defendant no such question was raised or even suggestion made either in the defence filed or in the cross-examination of the plaintiff's witnesses. The learned vakil for the appellant strenuously contended that the onus is on the plaintiff supporting the alienation to establish affirmatively the circumstances under which the father, the 1st defendant, was entitled in law to effect a valid alienation. The argument put forward was as follows: No doubt the original sum of Rs. 15,000 may be held to have been borrowed for paying off antecedent debts, but that is only the first item in the account; since then the 1st defendant has paid in to the credit of the account several sums of money; these payments would, according to the rules relating to the appropriation of payments, have reduced considerably the amount of the original debt; the amount now sued to be recovered, therefore, represents only moneys borrowed by the 1st defendant subsequently; there is no evidence with regard to the purposes for which these later amounts were borrowed and therefore the suit mortgage cannot be supported in the absence of any evidence to show that these later borrowings were for the purpose of discharging the father's antecedent debts. There would have been considerable force in this argument and great difficulty in deciding in favour of the plaintiff on the evidence before us, if the original contract between the parties had not been one of security by way of mortgage, having been intended in the very first instance to be security for a floating account. In the case of a floating account where security is intended to cover the maximum contemplated by the parties it is not possible, as pointed out by the learned Judge in the Court below, that after the maximum amount is once borrowed and drawn, subsequent payments in, can be regarded as payments made to reduce the maximum amount of liability, without any reference to or any contemplation of subsequent drawings or borrowings.

After all, all the rules relating to appropriation of payments and the rule formulated by the Master of the Rolls

Damodharam Chetti v. Banslal Abeerchand.

in *Clayton's case*[2] is a rule based on the intention of parties, actual, presumed or even imputed. If so, the payments in, made by a debtor who has already drawn the maximum amount, cannot be attributed to any intention on his part either to reduce the maximum available or even permanently to reduce the liability but are only ascribable, as pointed out by the learned Judge, to keep down the interest and make the amount available for being drawn out again.

It follows from this that the decision of the learned Judge could not be held to be wrong on any such hard and fast application of the rule relating to appropriation of payments.

The view that we have thus taken on the two points argued before us would be sufficient to dispose of the appeal. But it seems to us that the decision of the learned Judge can be supported on a much broader ground.

It is admitted that the first and fourth defendants belong to a caste or community of traders and that the first defendant's father was himself during his lifetime carrying on business in piece-goods. It is not contended before us that if the deceased father of the first defendant had carried on such business till his death and the first defendant had continued it subsequently, he would not have been entitled to borrow moneys for the purposes of such business. But it appears that the business which was carried on by the father was stopped by him for some years before his death and that the first defendant did not begin such business till a few years after his father's death. On this it was strenuously contended on behalf of the appellant that a business would cease to be a family business if it should cease to be carried on for such a considerable time. But it seems to us that there is no warrant for any such contention, much less for such a contention based on the length of the period of suspension.

After all, trade and commerce are largely dependent on time, place and condition and it seems to us monstrous to require that a person should be under an obligation to continue his business under any condition whatsoever and even though loss may be anticipated or certain under the penalty of the business carried on by him ceasing to be regarded as ancestral or family business. Such a requirement would obviously not be in the interests of family estates. Having regard to the general principles of Hindu Law it must be held that the substance and

2. (1816) 1 Mer 572. 35 E.R. 781.

subsistence of family are interrelated and that the family estate and the family business or profession, that is the "kulachara", are closely related and almost interdependent. On the one hand it is the family business or profession that is the origin of the wealth and the means by which it continues to be maintained and improved. On the other hand it is the family estate or wealth that makes the conduct of the family business or profession possible.

From this it would also follow that too narrow a construction should not be allowed to be placed on such expressions as "family trade or business" and that with changes of civilizations and conditions what should be applied is not a rigid rule of law but the principle on which it is based. It seems to us absurd to suppose that if a family business should be found to have consisted in the purchase and sale of one commodity, purchase and sale of another commodity should be held to be outside the scope of the family business. The *reductio ad absurdum* of such a rigid rule may be seen if the rule is pushed to its logical extreme and it should be sought to be contended that the ancestral business consisted only in the purchase and sale of 100 bags of rice per year and that, therefore, the purchase and sale of 150 bags of rice was a speculative extension of such business. Generally speaking, therefore, each case will have to be determined only with regard to its particular facts. The question to be determined in each case should be whether having regard to the recognized business, profession, means of livelihood or what is called the "kulachara" of the family, the particular enterprise or embarking was only within the reasonable limits of the exercise thereof or really having regard to its nature or extent, a new speculative enterprise. In this connection we may state that we entirely approve of the dictum of Sadasiva Aiyar, J., in the case of *The Official Assignee of Madras* v *Palaniappa Chetti*,[3] which is as follows:

> "I think that the right of a Hindu father belonging to a trading community to begin a lawful and ordinary trade business as a joint family business in which himself and his minor sons were partners cannot be disputed."

In this case it being not disputed that the family business has been one of purchase and sale of piece-goods the mere circumstance that the father of the first defendant ceased for some reason to carry on such business for a few years before his death

3. (1918) I.L.R. 41 M 824 at 835: 35 M.L.J. 473.

Damodharam Chetti v. Bansilal Abeerchand.

is not sufficient to make a similar business started by the son some time afterwards any the less a family business. If it be a family business, it cannot be argued that the first defendant had no right to borrow the moneys, the subject of the claim, for the purposes of carrying it on.

The decree of the learned Judge is therefore right and the appeal fails and is dismissed with costs.

A.S.V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Ordinary Original Civil Jurisdiction.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Ratansi D. Morarji .. *Plaintiff**

v.

The Administrator-General of Madras .. *Defendant.*

Ratansi D. Morarji v. The Administrator-General of Madras.

Succession Act—Hindu—Meaning—European or other non-Hindu if can become a Hindu—Proof of European becoming a Hindu and being a Hindu at the time of his or her death—Quantum—Law governing succession to such person—Hindu Law—European lady converted to Hinduism—Marriage with Vaisya according to Vedic rites—Validity of—Caste—Membership of—Necessity of, for a Hindu.

R., a lady of Austrian origin and domiciled in Great Britain was a Theosophist and a Hindu by conviction. She was also a vegetarian and was practically a Hindu in all her habits of life. After living in India for several years, she became formally converted to the Hindu faith, the ceremony of conversion being performed by a Society known as the Hindu Missionary Society, which had for its object the conversion of people of other faiths and their admission into the Hindu fold. Thereupon she changed her name and adopted a Hindu name. Immediately after the conversion she married the petitioner, who was a Bhatia, and who claimed to be a Vaisya, according to Vedic rites. She was regarded as a Hindu and treated by others as such, and, when she died shortly after, she was cremated according to the Hindu rites in a Hindu crematorium at Bombay. About a year before her death *R.* executed an unattested will at the Head-quarters at Adyar of the Theosophical Society bequeathing her properties to the petitioner, and the questions in the case arose on an application by the petitioner for letters of administration with a copy of that will annexed.

Held, that *R* was a Hindu and was a Hindu at the time of her death within the meaning of the Indian Succession Act, and that the will in question not having been executed either at Bombay or at Madras, it was valid, though unattested.

---

*T.O.S. No. 1 of 1928. 20th August, 1928.

Ratansi D. Morarji v. The Administrator-General of Madras

The word "Hindu" is used in Succession Act in a theological as distinguished from a national or racial sense.

A non-Hindu can become a Hindu. Membership of a caste is not a necessary pre-requisite for being a Hindu.

It is a question of fact in each case whether a given person is a Hindu or not. A European does not become a Hindu merely because he proposes a theological allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism and its practices; but if he resides long in India, abdicates his religion by a clear act of renunciation and adopts Hinduism by undergoing formal conversion, gives up along with Christianity his Christian name and deliberately assumes a Hindu name, marries in accordance with Hindu religious rites a person who is a Hindu by race and religion, and cuts himself off from his old environment and takes to the Hindu mode of life, in such a case the Court may justly come to the conclusion that he has become a Hindu within the meaning of the Succession Act.

A European who becomes a Hindu becomes also subject to the Hindu Law, the test in such a case being not one of domicile but of religion.

The marriage between *R* and the petitioner was a valid marriage.

Held further, therefore, that even if the will was held to be invalid as having been executed within the Presidency Towns of Madras and Bombay, and the case had to be disposed of as if *R* had died intestate, the petitioner being her husband, would, under S. 218 of the Succession Act, be entitled to a grant of the administration.

S. Duraiswami Aiyar instructed by *Srinivasaraghavan* and *Tyagarajan* for petitioner.

H. D. Cornish, Administrator-General, appeared in person.

The Court delivered the following

JUDGMENT.—This case raises questions of great importance:

(1) Is it open to a lady of European origin to become a Hindu by conversion?

(2) Is her marriage, after such conversion, with a Hindu gentleman, Bhatia by caste, valid?

The facts of the case are interesting. Mena Renda was of Austrian origin and domiciled in Great Britain. She was a Theosophist and a Hindu by conviction. She was further a vegetarian and has been described as having been practically a Hindu in all her habits of life. She was living in India for several years, about 12 or 13, and then expressed a desire to be formally converted to the Hindu faith. There was a Society founded in Bombay in 1917 known as the Hindu Missionary Society. Its object was to perform "Sudhi," that is to

Ratansi D. Morarji v. The Administrator-General of Madras.

say, convert people of other faiths and admit them into the Hindu fold. On the 21st of May, 1922, at her request, this Society performed the ceremony of conversion. She changed her name and adopted a Hindu name, *viz.*, Sulochana. Immediately after the conversion, on the same day, she married according to Vedic rites Mr. Ratansi Morarji, a mill-owner of Bombay and a Member of the Council of State. Mr. Vaidya and Mr. Raje, who belonged to the Hindu Missionary Society, officiated at the conversion as well as the marriage. They depose that in regard to both the events, Vedic religious rites were performed. Mr. Vaidya says—and his statement has not been challenged—that the rites performed were such as would be sufficient under the Hindu religion to effect a conversion. Mr. Vaidya and Mr. Raje are Brahmins as also Mr. Chunilal Bhat who was present and has been examined. It was Mr. Bhat who performed the *Kanyadana,* that is, who gave away the bride. The marriage was not performed secretly, but according to the evidence of Mr. Raje, it was not for certain reasons (not stated) made very public. The conversion as well as the marriage were published in the newspapers. Soon after the wedding, the lady and her husband left for Europe. They lived in Venice, in Paris and in London and returned to India in August. While they were in Europe, Mr. Morarji's brother was living with them as a member of their family. After their return, the husband went to Bombay, but the lady resided either at the Headquarters at Adyar of the Theosophical Society or was touring in South India. This state of things continued from August to December, 1922, when she also went over to Bombay, where she resided till her death on the 14th of August, 1923. In October, 1922, she made a will bequeathing her entire property to the petitioner, Mr. Morarji. The present proceeding relates to that will. Mr. Morarji claims letters of administration with a copy of that will annexed. The will has not been attested and one of the questions I have to decide is, is the will valid notwithstanding the fact that it has not been attested? This raises the question: Was she a Hindu at the time of the execution of the will? To proceed with my narrative, after she returned to Bombay, her husband lived at his own house, while she was living either on a flat or in Hotels. Mr. Morarji frequently visited her at those places and had his meals with her. In his evidence he deposes that she was regarded as a Hindu and treated by others as such. She died, as I have just said, on the 14th of August, 1923, and it is in evidence that she was

Ratanal D. Morarji v. The Administrator-General of Madras.

cremated according to the Hindu rites in a Hindu crematorium at Bombay.

These are in brief the facts of the case. Under S. 63 of the Indian Succession Act, for a will to be valid, it must be attested by two or more witnesses. This Section applies in the case of Hindus only to wills made *inter alia* within the local limits of the Ordinary Original Civil Jurisdiction of the High Courts at Madras and Bombay. (See sections 57 and 58.) In other words, if the testatrix was not a Hindu, the unattested will would in no case be valid; if she was a Hindu, it would be valid if it was made outside the Presidency Towns of Madras and Bombay.

This raises the point—Where was the will made? It is clear beyond doubt that the lady was not living at Bombay between August and December. It follows from that, that the will could not have been made at Bombay. Then, the alternative is, was it made in the City of Madras? According to the evidence, during that period she was residing at the quarters of the Theosophical Society at Adyar. This is beyond the local limits of the Ordinary Original Civil Jurisdiction of the High Court of Madras. If she was not actually residing at Adyar, she was touring in the mofussil. There is no positive evidence as to where the will was made. The Adyar Bridge separates her Adyar home from the City of Madras strictly so called. In fact, the distinction between this part of Adyar and Madras proper becomes important, so far as we are concerned, only for the purposes of the Act. If the will was executed while the lady was touring in the mofussil, it would, in that case, be undoubtedly valid. But then if she desired to make a will while at Madras (as understood generally and not as understood in the Act), it would be most natural that she should make it at her own home. Why should it be assumed that she left her home, crossed the bridge, came to a strange place and then executed the will? The paper that is produced as the will shows that no kind of formality attended its execution. It was the note paper of the lady with her monogram that was used. It is a brief will, consisting as it does, of a few lines. It leaves the impression that it was written in the privacy of her own room, unlike a will prepared with the aid of a legal adviser and with attendant formalities. I am prepared to infer that it was not executed at Madras, *i.e.*, as distinguished from Adyar beyond the bridge. I am satisfied on the evidence that the will was

Ratanji D. Morarji v. The Administrator-General of Madras.

not executed either at Bombay or at Madras and that it is therefore valid.

The next question is, was she a Hindu? If she was not, even on my finding that it was executed outside the limits of the Cities of Madras and Bombay, it would still be invalid. The answer depends upon the meaning of the word "Hindu" as used in the Indian Succession Act. It has been consistently held that the word "Hindu" is used in the Act in a theological as distinguished from a national or racial sense. In *Dagree* v. *Pacotti Sanjao*[1] the question arose, whether Indian Christians were Hindus under the Act. If the term was used to denote a race, the parties being Hindu converts would clearly be Hindus; but the Court held that they were not. Starling, J., citing Stokes' Anglo-Indian Codes, states his conclusion that the term as used in the Act is "a theological term as denoting any person professing any form of the Brahmanical religion or religion of the Puranas".

In *Re Joseph Vathiar of Nazareth*[2] the High Court upheld the decision of the Civil Judge, who held that native Christians are not Hindus within the meaning of the Act on the ground that the word connotes a religious and not a national distinction.

If the term "Hindu" is a theological expression, the question arises: Is it legally permissible to a non-Hindu to become a Hindu? In 3 M. H. C. R., Appendix, page vii, the point for decision was whether a Christian convert relapsing to Hinduism could be convicted of bigamy on marrying a second wife. Holloway, J., observes :

> "It seems impossible to assume that a man is not equally free to go from Hinduism to Christianity and if he pleases back from Christianity to Hinduism."

The Court (Holloway and Innes, JJ.) held that the prisoner became a Hindu and was not guilty of bigamy and it quashed the conviction by the Lower Court. In *Muthuswami* v. *Masilamani*[3] a marriage was contracted according to Hindu rites by a Hindu with a Christian woman, who before marriage was converted to Hinduism. Sankaran Nair and Abdur Rahim, JJ., held that the marriage was valid under the Hindu law. The ground of decision was, that the Christian lady became a Hindu on conversion although not a Hindu belonging to any of the

1. (1895) I.L.R. 19 B 783. 2. (1872) 7 M.H.C.R. 121.
3. (1909) I. L. R. 33 M. 342 : 20 M. L. J. 49.

Ratansi D. Morarji v. The Administrator-General of Madras.

three regenerate castes. This decision is not confined to Christians by profession only, but equally applies to those who are Christian by descent as well. *Fanindra Deb* v. *Rajeswar Dass*[4] related to a family which was of "non-Hindu origin"; if its members had become "Hindus out and out" it was assumed that they would be governed by the Hindu Law unless a special custom was proved. In *Sahdeo Narain* v. *Kusum Kumari*[5] the Court had to deal with a clan who became converted to Hinduism about 100 years previously. The Judicial Committee held that the clan "had become sufficiently Hindu" to be *prima facie* governed by the Hindu Law. The expressions (1) "Hindus out and out" and (2) "become sufficiently Hindu" are the expressions used by the Privy Council. In the last mentioned case, their Lordships referring to *Palaniappa Chetty* v. *Alagan Chetty*[6] allude to a mass of tribes in Southern India who became "Hinduised and subject to the law of the Smritis in most respects".

If then according to judicial decisions, a person who both by descent and profession is a Christian can become a Hindu, if the re-conversion of an apostate is permissible, if tribes of non-Hindus can be admitted into the Hindu fold, what light do facts of Indian history throw on this question? Sir Charles Eliot in his valuable work "Hinduism and Buddhism" says :

> "It is not quite correct to say that one must be born a Hindu, since Hinduism has grown by gradually Hinduising the wilder tribes of India and the process still continues " (Introduction, page 37.).

The chief feature of Hinduism is its tendency to absorb beliefs and to combine and amalgamate deities. There was a great fusion of ideas and even Persian and Greek religions made their contribution. The amplification of Hinduism and the absorption of non-Hindu tribes into the Hindu fold were not necessarily two distinct and separate processes.

> "Whenever a popular cult grew important or whenever Brahmanic influence spread to a new district possessing such a cult, the popular cult was recognised and Brahmanised. This policy can be abundantly illustrated for the last four or five centuries (for instance in Assam), and it was in operation 2½ millenniums ago or earlier." (Vol. I, page 104)

If non-Hindu Gods were thus accorded recognition, non-Hindu tribes were similarly absorbed. The learned writer

4. (1885) 12 I A 72 : I.L.R 11 C. 463 (P C.).
5. (1922) 50 I.A. 58 : 44 M.L.J. 476 (P.C.).
6. (1921) 48 I. A. 539 : I.L.R. 44 M. 740 (P.C.)

Ratanal D. Morarji v. The Administrator-General of Madras.

points out that the treatment by Hinduism of men and Gods is curiously parallel.

"Princes like the Manipuris of Assam came under Hindu influence and were finally recognised as Kshatriyas with an imaginary pedigree, and on the same principle their deities are recognised as forms of Siva or Durga." (Introduction, page 37.)

In a foot-note, he points out that according to Census of India, 1911, Assam, p. 47, about 80,000 animists were converted to Hinduism in Goalpara between 1901 and 1911 by a Brahmin called Sib Narain Swami. This admission into the Hindu society was not confined to the aboriginal tribes. Even the foreigners that invaded India were gradually assimilated. Speaking of several Royal families of the country, Sir Charles Eliot observes :

"Many of these belong to districts which were formerly without the pale of Hinduism; many more are the descendants of the northern hordes, who, century after century, invaded India." (Book I, page 35.)

The Kushana dynasty which produced great Hindu rulers was in its origin non-Hindus. The names of the kings, Kadphises, Kanishka and Huvishka are not Indian; but Vasudeva, a later ruler, belonging to the same dynasty, bears a Hindu name. There are several instances of Greeks (Yavanas) who bore Hindu names and became absorbed in Hindu society. The history of Hinduism is thus one of gradual expansion and several races and tribes originally of non-Hindu origin were incorporated into it.

Then comes the question, is membership of a caste a necessary pre-requisite for being a Hindu? In other words, is it incumbent upon every Hindu to belong to some caste? The statement that a man cannot be a Hindu, unless he belongs to a caste, is true in the sense that it is descriptive of a process. The convert, to start with, belongs to some community which adopts Hindu usages and it is then recognised as a caste at first of very low standing, but in a few generations it may rise in the general esteem. ("Hinduism and Buddhism," Introduction, page 38.) Sikhs have been held to be Hindus. (*Rani Bhagwan Kuar* v. *Jogendra Chandra Bose*[7].) Similarly, Lingayats have been treated as being within the pale of Hinduism. And yet, Nanak, the founder of the Sikhs and Basava, the founder of Lingayats, taught that there was no distinction of caste. The sect which comes into existence declaring that there is no caste ends by observing caste. As Sir Charles Eliot puts it

7. (1903) 30 I.A. 249: 13 M.L.J. 381 (P.C.).

"The sect which renounced caste becomes itself a caste" (*See* Vol. II, page 177.)

'Hindu life is permeated by the instinct that society must be divided into communities having some common interest and refusing to intermarry or eat with other communities." (Vol II, page 178.)

It will thus be seen that a group of individuals professing Hinduism and adopting the Hindu mode of life may in course of time become a separate caste. But this does not show that till such a caste is formed, a member of this group is not a Hindu. While the caste is in the process of formation, can it be said that the individual is beyond the bounds of the Hindu religion? Then again, if a man secedes from his caste or is expelled from it, he does not, on ceasing to belong to some caste, cease to be a Hindu. The instinct of the average Hindu may assign a new caste to those who declare that they belong to no caste. But, in such a case, is the man who belongs to no caste, to be regarded as being outside the pale of Hinduism on the ground that a new caste, which claims him, has not come into being? As Bhattacharya points out, each Hindu sect which is formed, is practically a new caste. (*"Hindu Castes and Sects,"* Preface.)

I am therefore clearly of the opinion that it is not a valid objection to a man being treated as a Hindu that he does not belong to some caste.

Was the lady in question a Hindu at her death?

It is a question of fact in each case whether a given person is a Hindu or not. A European does not become a Hindu merely because he professes a theoretical allegiance to the Hindu faith, or is an ardent admirer and advocate of Hinduism and its practices; but if he resides long in India, abdicates his religion by a clear act of renunciation and adopts Hinduism by undergoing formal conversion, gives up along with Christianity his Christian name and deliberately assumes a Hindu name, marries in accordance with Hindu religious rites a person who is a Hindu by race and religion, and cuts himself off from his old environment and takes to the Hindu mode of life, in such a case the Court may justly come to the conclusion that he has become a Hindu within the meaning of the Indian Succession Act. These tests are satisfied in the present case and I therefore hold that Mena Renda otherwise called Sulochana was a Hindu at her death.

It then follows that the will executed by her is valid and the petitioner is therefore entitled to letters of administration with a copy of that will annexed.

Ratanal D. Morarji v. The Administrator-General of Madras.

I have now dealt with the case on the footing that the will was executed outside the Presidency Towns of Madras and Bombay. If I am wrong in this finding, the case must be disposed of, as if Mena Renda died intestate. Section 218 of the Succession Act says :

"If the deceased has died intestate and was a Hindu, the administration of his estate may be granted to any person who, according to the rules of the distribution of the estate applicable in the case of such deceased, would be entitled to the whole or any part of such deceased's estate."

If the petitioner was her husband, he would be entitled to a grant of the administration. This raises the question, is the marriage valid? This point again must be decided with reference to the Hindu Law on the subject.

To apply the Hindu Law to a European may seem strange. But according to the law of British India, in the case of Hindus (as in the case of Muhammadans), questions of personal law are determined not by the test of domicile but by reference to the religious community to which that person belongs. In other words, the law of Hindus and Muhammadans is the law of their religion. Part II of the Indian Succession Act dealing with domicile does not apply *inter alia* to Hindus. (*See* S. 4.) According to the English law, a person's domicile determines his civil status. This means that the law which governs him is the law of the country of his domicile and it is attached to his person and remains so attached wherever he goes, until he changes his domicle, upon which the law of the new domicile becomes attached to him in the same manner. (6 Halsbury "Conflict of Laws," p. 183.)

The Indian Succession Act contains provisions to the same effect. The result is that while ordinarily a British Indian subject can change his domicile and acquire a new law along with a new domicile, this right is denied to a Hindu. It must be borne in mind that I am now dealing with the law to be administered by a British Indian Court. Under that system of law, a Hindu carries along with him his personal law wherever he goes and he cannot, however fixed his determination may be, get rid of that law. Is the person a Hindu? Then, wherever the law of British India admits the operation of a personal law, his rights and obligations are determined by the Hindu Law, that is the law of his religion, subject to the exception that by statute any part of that law may be abrogated. This intimate connection between law and religion in the case of

Ratansi D. Morarji v. The Administrator-General of Madras.

Hindus and Muhammadans is fully dealt with in the judgment of the Judicial Committee in *Abraham* v. *Abraham*[8]. (See also the arguments of Counsel in the case.) In accordance with this principle, if a Hindu becomes a convert to Muhammadanism, he is, by virtue of his conversion, governed by the law of his new religion; this is the general presumption, though a special usage may override it.

"The reason for it is * * * * * the written law of India has prescribed broadly that in questions of inheritance and succession, the Hindu law is to be applied to Hindus and the Muhammadan law to Muhammadans." [*Jowala Buksh* v. *Dharum Singh*, (1866) 10 M.I.A. 511 at 537.]

[*See also* Charter of the Supreme Court, 1800; Clause 19 of the amended Letters Patent, 1865, and Trevelyan on "Civil Courts in India," page 59, citing *In the matter of the petition of Kahandas Narrandas*, (1881) I.L.R. 5 B. 154.]

Where the law of the domicile applies, it has been held that it is unnecessary that a person should realise the legal result of his conduct. If he acquires a new domicile, he acquires a new law along with it. (*See* Halsbury, Vol. VI, page 186.)

By analogy, a European who becomes a Hindu, becomes also subject to the Hindu law, although in this case, the test is not one of domicile, but one of religion.

I shall now deal with the point whether the marriage is valid.

In *Bai Gulab* v. *Jiwanlal Harilal*[9] it was held by the Bombay High Court that according to the Hindu law as administered in that Presidency, a marriage between a Vaisya male and a female was valid. In the judgment in that case are discussed the original authorities bearing on anuloma marriages. Chandavarkar, J., in *Bai Kashi* v. *Jamnadas*[10] after an examination of the Smritis and the Commentaries, also arrives at the conclusion that anuloma marriages are valid. In that case, the question related to a pratiloma marriage and it was held that it was invalid under the Hindu law. I am prepared to follow these cases and hold that the marriage in question is valid. I am not to be understood as saying that pratiloma marriages are

8. (1863) 9 M.I.A. 195.
9. (1921) I.L.R. 46 B. 871.
10. (1912) 14 Bom. L.R. 547.

Ratansi D. Morarji v. The Administrator-General of Madras.

invalid; that is not a question on which it is necessary to express any opinion at present. An anuloma marriage means a marriage between a man of a higher and a woman of a lower caste. In this case, the husband, a Bhatia, claims to be a Vaisya. Was the lady then a sudra? In *Muthuswami* v. *Masilamani*[3] already referred to, the wife who became a Hindu was treated as a sudra. But the judgment shows that the word 'sudra' was not used in its ordinary sense. It was used in a somewhat special sense; in that term

> "it was intended to include all Hindus who are not dwijas or twice-born classes."

Whether, in such circumstances, a higher caste may not be assigned to one in the position of Sulochana, is a question which I leave open, observing for the present, that it deserves to be carefully considered, from the standpoints, both of ancient authority and of historical evidence.

I have come to the conclusion that the marriage under consideration is, for the reasons I have stated, valid.

I may add that I do not entertain the slightest doubt as regards the genuineness of the will. The facts, that it was signed by the lady in her maiden Christian name and that the petitioner is not described as her husband, these facts may be easily explained. The disposition was not to rest on the validity either of the marriage or of the conversion. To bring about this result, the testatrix had to adopt this course of conduct.

In the result, I direct grant to the petitioner of letters of administration with a copy of the will annexed.

Costs of both parties shall come out of the estate.

A. S. V. *Letters of administration granted.*

---

3. (1909) I.L.R. 33 M. 342 : 20 M.L.J. 49.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE RAMESAM.

Venkatapathi Nayakar, minor through his mother and next friend Suppammal .. *Appellant* (*Plff.*)*

v.

Pappia Nayakar and another .. *Respondents* (*Defts.*).

Venkatapathi Nayakar v. Pappia Nayakar.

Hindu Law—Joint family—Sale by manager—Suit by junior members to set aside—Proportion of proved consideration to the value of the vendor's share—Form of decree—Equities in favour of alienee.

In the case of a sale of joint family properties by the manager of the joint Hindu family, where the consideration proved for the sale, after being allotted to the vendor's share only, is grossly inadequate, the whole sale should be set aside making the consideration proved a charge on the properties. Where, however, the consideration proved is not grossly inadequate and can be regarded as the price of the vendor's share but is less than the value of such share, the sale should be upheld as the sale of the vendor's share only and the other members of the joint family who question the sale are entitled to recover their shares of the properties without being subjected to any other equity. In such a case, if the members are divided, and the vendor leaves other heirs than the members who question the sale, he or his heirs may have a right to contribution. But if the consideration proved exceeds the value of the vendor's share, the sale should be upheld as a sale of the vendor's share only and for the excess a charge should be given over the shares of the other members.

Seetharam Naidu v. *Balakrishna Naidu,* (1913) 26 M.L.J. 604 and *Adinarayana Reddi* v. *Subbarayalu Reddi,* (1927) 104 I.C. 621 not followed.

Muthu Krishna Naidu v. *Muthu Krishnappa Naidu,* (1917) M.W.N. 273 distinguished.

Rottala Runganatham Chetty v. *Pulicat Ramaswami Chetty,* (1903) I.L.R. 27 Mad. 162 (F.B.) explained.

Observations in *Vadivelam Pillai* v. *Natesam Pillai,* (1912) I.L.R. 37 Mad. 435 at 438 : 23 M.L.J. 256 dissented from.

Where in the case of a sale of joint family properties by the father Rs. 400 out of the total consideration of Rs. 600 recited in the document was only proved and the value of the father's share on the date of the sale was proved to be Rs. 500,

Held, that the transaction must be upheld as a sale of the father's share only and, as the vendee in such a case would lose no part of the consideration proved, there was no need for any further equity in his favour.

Second appeal against the decree of the Court of the Subordinate Judge of Tuticorin in Appeal Suit No. 103 of 1924 preferred against the decree of the Court of the District Munsiff of Koilpatti in Original Suit No. 10 of 1921.

*S.A. No. 1752 of 1925. 20th February, 1928.

Venkatapathi Nayakar v. Pappia Nayakar.

S. Varadachariar, P. R. Srinivasan, P. N. Appuswami Aiyar and *P. S. Nagaswami Aiyar* for appellant.

T. L. Venkatarama Aiyar for respondents.

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J.—This Second Appeal arises out of a suit by a minor plaintiff represented by his mother and next friend to set aside a deed of sale, Exhibit XX, dated 21st November 1920, executed by his father, the late Subba Naick, in favour of the 1st defendant. The plaintiff claimed to be the adopted son of Subba Naick and was so found by the Courts below. Subba Naick died on the date of the sale deed soon after the execution. His father Pappia Naick (*i.e.*, the grandfather of the plaintiff) died on the 1st December 1920. The sale deed was executed for Rs. 600. The vendee was the minor son of Subba Naick's wife's brother Lakshmipathi, who is the second defendant. The plaintiff alleged that Subba Naick was not in a sound disposing state of mind when he executed the sale deed. But this point was found against the plaintiff by the District Munsiff and is not pressed before the Subordinate Judge or before us. The plaintiff alleged that the property sold was joint family property of the vendor's family; but the defendants contended that it was his self-acquisition. This issue was found in plaintiff's favour by the Courts below. The respondent attacks this finding before us on the ground that the plaintiff is now precluded from raising this question by reason of an order on the claim petition dated 6th December 1911—Exhibit II (*b*). The facts relevant to this point are that the late Subba Naick sold his share of the family property to one Ganapathi Asari under Ex. II dated 13th March 1911. Afterwards when the property was attached by a creditor, Ganapathi Asari filed a claim petition and the claim was allowed. No regular suit was filed within one year from the date of the order by Subba Naick to set aside the order and the respondent contends that the order operates as *res judicata* against the plaintiff. The Courts below have now found that the sale deed in favour of Ganapathi Asari was a sham transaction effected with a view to defraud Subba Naick's creditors. This finding is a question of fact and must be accepted. But the question whether, in spite of this finding, the order Ex. II (*b*) precludes the plaintiff from contending that the sale of Subba Naick's property was a sham still arises. It is clear on the facts that if the transaction was a sham transaction brought about to defraud creditors Subba Naick himself, having defeated his

Venkatapathi Nayakar v. Pappia Nayakar.

Ramesam, J.

creditors, would be estopped from contending that the sale was a sham transaction. But neither estoppel nor *res judicata* can operate against the plaintiff who is a member of the undivided family of Subba Naick whose right arises by adoption and he cannot be said to claim through Subba Naick. The result is that the finding that the suit properties are joint family properties of the vendor's family must stand.

The next question is whether the sale is binding on the plaintiff. The District Munsiff found that the sale was not supported by any consideration and that the properties were worth not less than Rs. 2,000 and held that the sale was not binding on the plaintiff and gave a decree as sued for. On appeal the Subordinate Judge found that a part of the consideration of Rs. 600, namely Rs. 400, was proved by Exhibit XVII series; and he also found, that the properties were worth Rs. 2,000 and therefore there was no justification for selling the properties as the consideration proved amounted only to Rs. 400. He further held that the sale was not valid and binding on the plaintiff's share of the properties, which he thought was a half and that it was binding on the other half which he thought belonged to Subba Naick. The plaintiff filed this second appeal.

In Second Appeal, Mr. Varadachariar, who appeared for the appellant contended that, as the plaintiff's grandfather was alive at the time of the sale, Subba Naick's share was only one-fourth and that even on the Subordinate Judge's findings the sale should be set aside as far as the remaining ¾th share was concerned. So far as this question as to the extent of the share of Subba Naick is concerned, the respondent concedes that it was one-fourth. Secondly, Mr. Varadachariar relying on *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetti*[1] contended that the whole sale must be set aside on condition of his paying to the vendee Rs. 400, the consideration proved, which he is willing to do. But even in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*[1] what was held was that the transaction could be upheld against the family in respect of the alienor's interest in the joint family property only to the extent of the value received and that if the conveyance had been of a reasonable portion of the joint family property for the discharge of an antecedent debt the conveyance as such would bind the sons also; but in the circumstances of the particular case

1. (1903) I.L.R. 27 M. 162 (F.B.).

Venkatapathi Nayakar v. Pappia Nayakar.

Ramesam, J.

it was held that the vendee could not claim the benefit of the sale even as regards the father's share. In that case, even if the sale was regarded as a sale of the father's share the consideration would be grossly inadequate and to give effect to the sale of the father's share would be to evade the principle of Hindu Law that it is incompetent to an individual member of a Hindu family to alienate by way of gift his undivided share or any portion thereof and this principle cannot be evaded by the undivided member professing to make an alienation for value when such value is manifestly inadequate and inequitable. On the other hand there are other cases, such as *Marappa Goundan* v. *Rangaswami Goundan*[2] and *Vadivelam* v. *Natesam*[3] and others, which will be presently referred to, where the transaction was upheld as a sale of alienor's share only where the consideration is not grossly inadequate when it is so regarded. In the present case, if the sale is regarded as a sale of the father's share only, as the share was worth Rs. 500, the sale could not be regarded as for a grossly inadequate consideration and as practically effecting a gift of his share and there is no objection to upholding the sale as one of the father's share only. In this respect the facts of the case before us do not resemble the facts in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*[1] but resemble the facts of the other cases mentioned above.

The only question that next arises is whether there is any equity in favour of refunding any portion of the purchase money to the vendee. In *Marappa Goundan* v. *Rangaswami Goundan*[2] it was found that the sale was supported only to the extent of Rs. 120 though the consideration was apparently a much larger sum and that the vendee was practically a volunteer and therefore it was held that the sale must be upheld in respect of the vendor's share and no charge could be given on the plaintiff's share for 2|3rds of the debt found to be binding. This decision came up for consideration before another Bench of this Court in *Vadivelam* v. *Natesam*[3]. In that case the Court held that, where a portion of the consideration that was proved was found to be binding on the whole family, it must be distributed over the whole of the property sold in proportion to the value of each part. They upheld the sale of the alienor's share and also gave a charge on the rest of the property for the proportion of the debt found

1. (1903) I.L.R. 27 M. 162 (F.B.).
2. (1899) I.L.R. 23 M. 89.
3. (1912) I.L.R. 37 M. 435 : 23 M.L.J. 256.

Venkatapathi Nayakar v. Pappia Nayakar.

Ramesam, J.

to be binding on the other shares when so distributed. At page 438 it was observed :

"It cannot be doubted that a co-parcener is entitled to part with his own share in any family property for any consideration he pleases."

This principle is no doubt correct where the vendor is a divided member, but where he is still a member of a joint family this proposition conflicts with the statement of law in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*[1] where it was observed that the principle that a member of a joint family cannot make a gift of his share cannot be evaded by making a sale for a grossly inadequate consideration and practically making a gift of the property. We agree with the observation in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*[1] and are inclined to dissent from the observation in *Vadivelam* v. *Natesam*[3]. The result would be if the consideration is distributed over all the shares and if we then try to uphold the sale even as regards the alienor's share the sale of that share should be for a grossly inadequate consideration. In the present case the sale of the father's share which is worth Rs. 500 at least would be Rs. 100 which is his ¼ share of the consideration proved. Looked at from this point of view the sale of the father's share too would be for an inadequate consideration with the result that it cannot be upheld on the principles laid down in *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*[1]. In such a case the only equity that can be worked out in favour of the vendee would be to uphold the sale of the alienor's share and to allot the whole of the consideration as consideration for that share. If it is less than the value of the alienor's share, no further equity in favour of the vendee arises. If it is more, for the excess a charge may be given over the shares of the co-parceners. Even when the consideration is so allotted if it is grossly inadequate compared with the value of the alienor's share, it may be that the sale cannot be upheld even for his share. It may be that in such a case where the consideration is found to be binding on the whole family the effect of allotting the consideration wholly to the alienor's share would be to give rise to some equity in favour of the alienor, for the result of such allotment would be to make him bear the whole of the debt whereas it is a debt really binding on the whole family. If the family is divided, as a result of this transaction,

1. (1903) I.L.R. 27 M. 162 (F.B).
3. (1912) I.L.R. 37 M. 435 at 438 : 23 M.L.J. 256.

Venkatapathi Nayakar v. Pappia Nayakar.

Ramesam, J.

it may be that he may file a suit for contribution; but if the family continues undivided there is no need for such equity. Where the vendor is dead and his representatives are the other members as in the case before us, then also there is no need for such equity.

To sum up, three possible cases arise :

1. Where the whole of the consideration, even after being allotted to the alienor's share only, is grossly inadequate, the whole transaction may have to be set aside making the consideration proved a charge on the family property. That would be a case resembling *Rottala Runganatham Chetty* v. *Pulicat Ramaswami Chetty*[1].

2. Where the whole consideration is not grossly inadequate and can be regarded as the price of the alienor's share but is less than the value of such share, the transaction may be upheld as the sale of the alienor's share only and the other members who question the transaction are entitled to recover their share of the property without being subjected to any other equity. The case would then resemble *Marappa Goundan* v. *Rangaswami Goundan*[2]. In such a case if the members are divided and the alienor leaves other heirs than the members who question the transaction, he or his heirs may have a right to contribution.

3. Where the consideration proved exceeds the value of the alienor's share, the transaction may be upheld as a sale of the alienor's share only and for the excess a charge may be given over the shares of the other members.

The present case falls under the second of the above cases. The value of the father's share is Rs. 500 and the considera-tion proved is Rs. 400. If the transaction is upheld as a sale of the alienor's share only, the vendee loses no part of the considera-tion he paid and there is no need for any further equity, nor is there any need for any right of contribution in favour of the father for he died immediately after the sale and the plaintiffs are his representatives. The result is that we uphold the transaction as a sale of the father's share only, that is one-fourth of the property. The decree is accordingly modified. The plaintiff will be entitled to mesne profits and to three-fourths share.

For the reasons given above we are not inclined to follow the decisions of single Judges in *Seetharam Naidu* v. *Balakrishna*

1. (1903) I.L.R 27 M. 162 (F.B).
2. (1899) I.L.R. 23 M. 89.

Naidu[4] and *Adinarayana Reddi* v. *Subbarayalu Reddi*[5] which practically follow the decision in *Vadivelam* v. *Natesam*[3]. In the former of those two decisions the particular point now argued before us was not raised.

The respondent also relied on *Muthu Krishna Naidu* v. *Muthu Krishnappa Naidu*[6]. In that case the plaintiff offered to pay his share of the consideration found proved and the point now argued did not arise. It cannot therefore be regarded as an authority supporting the respondent.

In the appeal, the parties will bear their own costs.

The memorandum of objections will be dismissed with costs.

In the Courts below, the parties will give and take proportionate costs.

N. S. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE DEVADOSS.

Municipal Council, Chidambaram .. *Petitioner in all** (*Complainant*)

v.

Subramania Aiyar and others .. *Respondents* (*Accused*).

Madras District Municipalities Act (*V of* 1920), *S.* 249, *cl* (5)—*Renewal of license—Grant of—30 days period fixed by clause—Failure to comply with—No bar to grant of renewal.*

In the case of renewal of a license, though clause (5) of S 249 of the District Municipalities Act speaks of 30 days, there is no bar to the issue of a license by reason of the application for renewal not having been made not less than 30 days before the end of the year. The provision ought not to be understood as if it was one of the articles of the Limitation Act standing in the way of the Chairman granting a license.

Petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Stationary Second Class Magistrate of Chidambaram in Calendar Cases Nos. 414, 477, 99, 113, 98, 337, 127, 142, 413, 398, 162, 141, 126, 112, 338 and 163 of 1927.

---

*Cr. R. C. Nos. 847 to 862 of 1927. 20th April, 1928.
(Cr. R. P. Nos. 755 to 770 of 1927.)

3. (1912) I.L.R. 37 M. 435 : 23 M.L.J. 256.
4. (1913) 26 M.L.J. 604. 5. (1927) 104 I.C. 621.
6. (1917) M.W.N. 273.

Municipal Council, Chidambaram v. Subramania Aiyar.

K. Bhashyam Aiyangar and *J. R. Gundappa Rao* for petitioner in all the cases.

T. V. Ramanatha Aiyar, M. Patanjali Sastri, K. S. Jayarama Aiyar for *S. Nagaraja Aiyar* for (Accused) respondents.

K. N. Ganapathi for *Public Prosecutor* (*in charge*) on behalf of the Crown in all the cases.

The Court delivered the following

ORDER.—*Cr. R. C. Nos.* 852 *and* 861 *of* 1927.—In these two petitions, the only question that needs consideration is whether there was a notification under S. 249 (1) of the District Municipalities Act. The Lower Court has addressed itself to the question of the resolution of the Council. Evidently it was misled by the cross-examination on behalf of the accused. If there was a valid notification under S. 249 (1) of the District Municipalities Act, the persons who carry on the trades mentioned in the notification would be bound to take out licenses. The notification that is now produced is dated 26th January, 1926, and Mr. Jayarama Aiyar contends that there was no resolution of the Council before that date authorising the publication of the notification. No doubt, in the evidence of the first witness he speaks of the first resolution of the Council of 2nd February, 1926. From that it cannot be inferred that there was no previous resolution. This is a question of fact which will have to be determined by the Trial Court. The trial of the Lower Court was incomplete and the Court did not address itself to the real question in dispute, namely, the publication of the notification as required by S. 249 (1) of the District Municipalities Act. I set aside the orders of acquittal in both the cases and direct that the cases be retried. The accused will be entitled to raise any contention that is open to them.

Cr. R. C. Nos. 851 *and* 849 *of* 1927.—There is no question of law. Dismissed.

Cr. R. S. Nos. 850, 853, 854, 857, 858, 859, 860 *and* 862 *of* 1927.—There is no reason to interfere with an order of acquittal. The petitions are dismissed.

Cr. R. C. Nos. 848 *and* 856 *of* 1927.—There is no reason to interfere with an order of acquittal. The petitions are dismissed.

Cr. R. C. Nos. 855 *and* 847 *of* 1927.—In these cases applications were made for license on 26th March, 1927. There does not seem to be an order of the Chairman refusing to grant a license. Mr. Bhashyam Aiyangar

Municipal Council, Chidambaram v. Subramania Aiyar.

argues that the applications not having been made not less than 30 days before the end of the year, the applications were refused. Clause 5 of S. 249 of the Act runs as follows:—

"Applications for renewal of such licenses shall be made not less than 30 days before the end of every year and applications for licenses for places to be newly opened shall be made not less than 30 days before they are opened."

With regard to the opening of new places, the section requires that applications should be made 30 days before they are opened so as to enable the municipal authorities to satisfy themselves that the new places to be opened would not affect the health or the convenience of the neighbourhood. But when it is a question of renewal of license, though the section speaks of 30 days there is no bar to the issue of a license by reason of the applications not having been made not less than 30 days before the end of the year. The provisions of the Municipal Act should be understood and worked in such a way as to avoid friction and without causing hardship to the public. Municipalities are statutory bodies and they are created by statute for the benefit of the public, and it is not proper that any provision of law relating to them should be so construed as to work hardship if not injustice. The provisions like the one referred to above should not be understood as if it is one of the articles of the Limitation Act standing in the way of the Chairman granting a license. In these cases the Chairman would have been well advised to have granted the licenses to the applicants and his action in refusing the money orders is to say the least uncalled for. The petitions are dismissed.

A.S.V. — *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE THIRUVENKATACHARIAR.

Avadai Ammal v. Krishnan Chetti.

Avadai Ammal (died) her legal representative is Sundayee Ammal .. *Petitioner* (L.R. sought to be brought on record in the place of the deceased appellant in L.P.A. No. 292 of 1926 on the file of the High Court)*

v.

Krishnan Chetti .. *Respondent (Respt. in do.)*

Abatement—Order in execution—Appeal—Death of appellant—Legal representatives—Right to continue appeal—Civil Procedure Code, Order 22, R 12.

*C.M.P. No. 631 of 1927. 19th March, 1928.

Avadai Ammal v. Krishnan Chetti.

An appeal against an order in execution of a decree does not become incompetent when the appellant dies, but the legal representatives of the deceased appellant can be brought on record as appellants to continue the appeal.

Palaniappa Chettiar v. *Valliammai Achi*, (1926) I.L.R. 50 Mad. 1 : 51 M L J. 745 distinguished.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to bring the petitioner herein on record as the legal representative of the deceased appellant in L. P. Appeal No. 292 of 1926 preferred against the order in A. A. A. O. No. 3 of 1925 on the file of the High Court preferred against the order of the Court of the Subordinate Judge of Ramnad at Madura in A. S. No. 152 of 1924 (E. P. No. 164 of 1924, District Munsif's Court, Sattur, O. S. No. 391 of 1917 on the file of the Additional District Munsif's Court, Srivilliputtur).

C. A. Seshagiri Sastri for petitioner.

K. Chandrasekhara Aiyar and *Watrap S. Subrahmania Aiyar* for respondent.

The Court made the following

ORDER.—Respondent contends that, as this is an appeal in a matter in execution, the appeal became incompetent when appellant died on 16th November, 1926, and that the ruling of this Court in *Palaniappa Chettiar* v. *Valliammai Achi*[1] will preclude the maintainability of the appeal, and that the present petitioner's remedy is by way of a fresh execution petition. The ruling in *Palaniappa Chettiar* v. *Valliammai Achi*[1] did not relate to the case of an appeal against an order in execution, and there are obvious difficulties, *e.g.*, questions of limitation, the maintainability of successive applications, etc., which will arise if the ruling is applied to cases of appeal.

We are not prepared to extend the application of the ruling to the present case and see no reason why the ordinary procedure relating to appeals when an appellant dies should not apply.

We reject the objection. The trial Court has held that petitioner is the legal representative of the deceased appellant. We allow the petition.

N. S. *Petition allowed.*

---

1. (1926) I.L.R. 50 M. 1: 51 M.L.J. 745.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

The Public Prosecutor .. *Appellant**

v.

Podimonu Beary .. *Accused.*

The Public Prosecutor *v.* Podimonu Beary.

Indian Penal Code (XLV of 1860), S. 407—Entrustment of goods to carrier at Mysore for delivery at Mangalore—Non-delivery of part of goods at Mangalore—Charge of criminal breach of trust—Absence of evidence as to where or when the goods were abstracted—Jurisdiction of Magistrate at Mangalore to try the offence—Criminal Procedure Code, S. 183—Offence committed outside British India—Applicability.

The accused, as a carrier, was entrusted by the proprietor of a Coffee Estate at Mysore with a certain quantity of parchment coffee to be carried by him from the estate at Mysore to Mangalore for delivery there to another coffee estate. When the consignment was handed over at Mangalore, it was found that from some bags coffee had been abstracted and tailings of no value substituted. The accused was charged with the offence of criminal breach of trust under S 407 of the Indian Penal Code before the Sub-divisional Magistrate of Mangalore, but acquitted by him on the ground that he had no local jurisdiction to try the offence as there was no evidence as to where or when the coffee was abstracted and, as, therefore, it could not be said that the offence took place in British India and not in Mysore territory.

Held, (on appeal) that the accused had committed *prima facie* a violation of the contract to deliver at Mangalore by the non-delivery and, in the absence of any proof by him that the disposal of the property in violation of the contract was not at Mangalore, the Magistrate at Mangalore had jurisdiction to try the offence

Nadar v. *Emperor,* (1923) 73 I.C. 323 not followed.

Section 183 of the Criminal Procedure Code only applies if the place of offence is in British India; it would not give jurisdiction to a Court in British India to try an offence committed outside British India merely because the offence was committed in the course of a journey.

Bapu Daldi v. *The Queen,* (1882) I.L.R. 5 Mad. 23 referred to.

Appeal under S. 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Court of the Sub-divisional Magistrate of Mangalore in C.C. No. 45 of 1927 on his file.

D. A. Krishna Variar for accused.

The Public Prosecutor for the Government.

The Court delivered the following

JUDGMENT.—This appeal is by Government against the acquittal of an accused by the Sub-divisional Magistrate, Mangalore. The facts of the case, so far as are necessary for the decision of this appeal, may be taken to be as follows.

*Cr. Appeal No. 650 of 1927. 15th February, 1928.

The Public Prosecutor v. Podimonu Beary

On 29th January, 1927, the accused as a carrier was entrusted by P. W. 3, the proprietor of Hosanalla Coffee Estate, Mysore, with 225 bushels of parchment coffee to be carried by him from the estate to Mangalore for delivery there to Volkart Brothers Coffee Works. When the consignment was handed over in Mangalore it was found that from 27 bags coffee had been abstracted and tailings of no value substituted. There was no evidence as to where or when the coffee was abstracted. On these facts the Police charge-sheeted the accused under S. 407 of the Indian Penal Code. Part of the defence was that the Magistrate had no local jurisdiction to try the offence. This contention has found favour with the Magistrate who held that as there was no evidence that the offence took place in British India and not in Mysore territory, it could not be held that the offence was committed within his jurisdiction. For this view he relied on a certain ruling of the Lahore High Court in *Nadar* v. *Emperor*[1] and in the result acquitted the accused, and Government has appealed.

Now it is obvious that on such a view of the case as the Magistrate has taken the result will follow that in all such cases a theft will never be brought to book at all when it is impossible to get evidence as to the exact locality of the theft, and that would be so in almost every such case. The British Court will refuse jurisdiction because it is not proved that the offence occurred in British India, and the Mysore Court which follows practically the same Code of Criminal Procedure will refuse jurisdiction because it is not proved that the offence occurred in Mysore. The offence will therefore go wholly unpunished, because it cannot be decided which court has jurisdiction. That is a result so opposed to justice and common sense that I should refuse to adopt it unless the processual law absolutely compels such a view.

The Public Prosecutor has relied upon section 183 of the Criminal Procedure Code, but I do not think that section assists here. It only applies if the place of offence is in British India; it would not give jurisdiction to a Court in British India to try an offence committed outside British India merely because the offence was committed in the course of a journey. This is the effect of the ruling in *Bapu Daldi* v. *The Queen*[2]. It appears to me that the real solution of the difficulty lies in an examination of the offence committed. The offence is criminal breach of trust by a carrier. The ingredients of a criminal breach of trust

1. (1923) 73 I.C. 323. 2. (1882) I.L.R. 5 M. 23.

The Public Prosecutor v. Podimonu Ileary.

so far as is necessary to set them out here are first, entrustment of property, and second, either a dishonest misappropriation of property or a dishonest disposal of that property in violation of any contract which the accused has made touching the discharge of such trust, or wilfully suffering any other person so to do. If the accused had taken dishonestly the coffee entrusted to him at some place on the journey between the estate and Mangalore, he would undoubtedly have misappropriated dishonestly the property entrusted to him, and could be convicted thereof by any Court which has jurisdiction over the locality where the misappropriation occurred. But apart from this, it appears to me reasonable to hold that, when he did not deliver the coffee at Mangalore he violated the contract under which he was entrusted with it, and that such violation would, if dishonest, make him equally guilty of a criminal breach of trust. That is, the offence of criminal breach of trust was committed in Mangalore itself, provided the failure was found due to dishonest disposal of that property or wilfully suffering any other person so to dispose of it.

The accused argues that this view is not in conformance with the rulings in *Re Rambilas*,[2] *Krishnamachari* v. *Messrs. Shaw, Wallace & Co.*[4] and *Bapu Daldi* v. *The Queen*[2]. I do not think this is so. In *Re Rambilas*[3] the property misappropriated was the proceeds of hundis entrusted by a Dharapuram merchant to accused for encashment in Bombay. The accused cashed these at Bombay and misappropriated the proceeds here. It was clear that the misappropriation was at Bombay, even though there apparently was an undertaking that the money was to be remitted to Dharapuram. So far as the facts in that case went, it was clear to the Bench that the misappropriation was complete when the cash was dishonestly taken in Bombay. The learned Judges no doubt go on to say that it is only the intention which is essential, but that dictum was doubted in *Krishnamachari* v. *Messrs. Shaw, Wallace & Co.*,[4] and further, that whether wrongful gain or loss results is immaterial. The argument that the contract was broken by failure to deliver the money was not accepted because first, the charge was not of use and disposal in violation of a contract, and secondly, because the offence would be committed where the dishonest use or disposal took place. The essential distinction between

2. (1882) I.L.R. 5 M 23.
3. (1914) I.L.R. 38 M 639 : 29 M.L.J. 175.
4. (1915) I.L.R. 39 M 576 : 29 M.L.J. 178.

The Public Prosecutor v. Podimonu Beary.

that case and the present is that the time and place of the actual misappropriation were known and these were fixed at Bombay and therefore it could not have been at Dharapuram. In *Krishnamachari* v. *Messrs. Shaw, Wallace & Co.*[4] a mofussil agent of a Madras firm misappropriated sale proceeds of his firm's goods. It was held that the Magistrate in Madras had no jurisdiction to try the case because the loss had actually occurred in the mofussil, really a very similar case to the above. *Bapu Daldi* v. *The Queen*[2] is called in aid more for what it does not say than for what it does. There a carrier entrusted with rice to be conveyed from Mangalore to Calicut took it into Goa and sold it there. The Court held that misappropriation occurred at Goa and therefore the Mangalore Court had no jurisdiction. It is argued that if the offence could have been constituted by the non-delivery at Calicut the Bench might have held that the case was triable at Calicut, but that was not the point before the Bench which was merely whether the Mangalore Court had jurisdiction. The *ratio decidendi* is that the conversion did not take place until Goa was reached.

Now in all these cases the time and the place of the dishonest conversion or disposal are definite, and the Court could therefore very definitely hold that it occurred at such and such a place and it was not necessary to go further and consider whether the contention that it occurred elsewhere was valid. The contention that the offence occurred at the place and time of the failure to deliver was negatived and rendered untenable by proof that it had occurred elsewhere. But in the present case the failure to deliver is the only evidence of the misappropriation and it is sufficient evidence of the time and place, in the absence of evidence to the contrary, to establish that there was a disposal in violation of the contract, at least at the place of delivery. If the accused wishes to contend that the disposal was not there, it is for him to show it. It is not a question of giving the benefit of the doubt to the accused. He had committed *prima facie* a violation of the contract at Mangalore by non-delivery. If he pleads that the violation was not at Mangalore, the onus of proving that rests upon him. I am not prepared to follow the Lahore ruling of a single Judge relied on by the Lower Court. I hold therefore that the Lower Court had jurisdiction to try the case.

---

2. (1882) I.L.R. 5 M. 23.
4. (1915) I.L.R. 39 M. 576 : 29 M.L.J. 178.

I allow the appeal, reverse the acquittal and direct that the accused be now tried.

The Public Prosecutor v. Podimonu Beary.

N. S. *Appeal allowed and re-trial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE CURGENVEN.

Rangaswami Goundan .. *Petitioner** (*Accused.*)

Rangaswami Goundan, *In re.*

Indian Penal Code (XLV of 1860), S 216—Essentials to be proved—Acquittal of the person harboured—Effect on conviction and sentence.

To constitute an offence under S. 216 of the Indian Penal Code it is enough to prove that as against the person harboured orders of apprehension had been issued for an offence, that is to say, for an offence alleged against him; it is not necessary to prove further that the person harboured has been found to be guilty. Though the acquittal of the person harboured cannot affect the legality of the conviction, it may well be taken into consideration in awarding sentence.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Coimbatore Division in Criminal Appeal No. 119 of 1927 preferred against the judgment of the Court of the Sub-divisional Magistrate of Pollachi in Calendar Case No. 333 of 1926.

V. Balasundaram Aiyar for petitioner.

K. N. Ganapathi for *Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner who prefers this Criminal Revision Petition has been convicted under S. 216, Indian Penal Code, for harbouring a person for whose apprehension orders had been issued, knowing of those orders and intending to prevent his being apprehended. The person in question, Marappa Goundan, was himself convicted under S. 215, Indian Penal Code, but was acquitted on appeal. The main argument now addressed to me is that when the person harboured has been found to be not guilty, an essential ingredient of the offence under S. 216 is lacking and accordingly that the conviction is bad. In order to support this argument, a number of cases relating to other sections have been cited. I do not consider that it is necessary for me to examine them in detail, as it will be found in each instance that it was held to be implicit if not

---

*Cr. R.C. No. 952 of 1927. 20th July, 1928.
(Cr. R.P. No. 856 of 1927.)

Rangaswami Goundan, *In re.*

expressed in the terms of the section dealt with that the person in respect of whom the offence was committed was himself an offender, *i.e.*, found guilty of an offence. For instance, in *Empress of India* v. *Abdul Kadir*[1] which dealt with S. 201, Indian Penal Code, it was considered not to be sufficient to show that there was reason to believe that an offence has been committed but that it must be shown that an offence had actually been committed, and that this is so, is, I think, clear from the opening words of that section. The same remark applies *mutatis mutandis* to the cases of *The Queen* v. *Joynarain Patro*[2] dealing with section 203, *Queen-Empress* v. *Fateh Singh*[3] dealing with section 212, *Girish Myte* v. *Queen-Empress*[4] and *Emperor* v. *Sanadal Lallubhai*[5] dealing with section 213 and *Queen-Empress* v. *Saminatha*[6] dealing with section 214. In the case of each of these sections, the nature of the offence, rightly construed, requires that the person in respect of whom it was committed had himself committed an offence. The same principle holds good, of course, with section 214, Indian Penal Code, which renders punishable the screening of a person from legal punishment for any offence. It is clear that no person can be screened from legal punishment for an offence if he has not rendered himself liable to it by his conduct. I can, however, discover no such necessary component in section 216. It is enough in my view to show that against the person harboured orders of apprehension had issued for an offence, that is to say, for an offence alleged against him. That is the meaning to attach to the word 'offence' occurring in the section is, I think, clear from the explanation of the word, as applied to acts committed outside British India, given in the sixth paragraph of the section. The purpose of the provision appears to me to penalise acts designed to obstruct or defeat the course of justice which requires that suspected persons should be arrested whether they may prove eventually to be guilty or innocent, and that it is not necessary to show that the offence in respect of which orders of apprehension were issued was actually committed. I am unable, therefore, to accept this as a ground for revision.

1. (1880) I. L. R 3 A 279 (F B.).
2. (1873) 20 W.R. (Cr.) 66.
3. (1889) I.L.R 12 A. 432.
4. (1896) I.L.R. 23 C. 420.
5. (1913) I.L.R. 37 B. 658.
6. (1890) I.L.R. 14 M. 400 : 1 M.L.J. 163.

Rangaswami Goundan, *In re.*

It is then said that the Trial Magistrate, although he conceded to the accused his demand for a *de novo* trial, acted upon some of the materials recorded in the earlier proceedings. I do not think it necessary to decide here whether the effect of a *de novo* trial is to wipe out all previous proceedings, because, with one very small exception, it is clear that the conviction is based exclusively upon the evidence recorded at the new trial. That exception consists in a remark by the Court that the accused had not stated before the previous Magistrate that he was not present in the village on the day in question. I do not think that that consideration can have had any material effect in securing his conviction, nor do I find any substance in the objection that in putting his first question to the accused the Sub-divisional Magistrate said "Do you wish to state anything more", because, in point of fact, the accused seems not to have been misled into supposing that his earlier statement would be taken into consideration, but proceeded to repeat in substance what he had then stated.

It is then said that the appellate judgment deals inadequately with the defence evidence. It is true that it has dismissed it with some brevity, but the evidence has been very fully discussed by the Sub-divisional Magistrate and I think it received as much consideration from the learned Sessions Judge as its importance merited.

Although I hold that the acquittal of the person harboured cannot affect the legality of the conviction, I think it may well be taken into consideration in awarding sentence. The petitioner has been sentenced to rigorous imprisonment for 6 months and it appears that the circumstance that the person harboured had received a sentence of two years was weighed in awarding that sentence. Since the latter has subsequently been acquitted, it will, I think, meet the ends of justice if the term of imprisonment awarded be limited to the period already undergone. To this extent, I allow this Criminal Revision Petition.

N.S. *Sentence modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Thiruvendipuram Chengalamma Garu and others .. *Appellants in both** *(Defts.)*

v.

Vemasani Veeraraghava Naidu and another .. *Respondents (Plffs.).*

Chengalamma Garu v. Veeraraghava Naidu.

Limitation Act (IX of 1908), Arts. 66 and 116—Registered mortgage bond—Personal remedy—Suit to enforce—Limitation

A suit on a personal covenant in a registered mortgage bond is governed by Art. 116 and not by Art 66 of the Limitation Act and the period of limitation is six years and not three years.

Ram Din v. *Kalka Prasad* [(1884) L.R. 12 I.A. 12: I.L.R. 7 All. 502 (P.C.)] and *Ganesh Lal Pandit* v. *Khetra Mohan Mahapatra* [(1926) I.L.R. 5 Pat. 585: 53 I.A. 134: 51 M.L.J. 82 (P.C.)] explained and distinguished.

Tricomdas Cooverji v. *Gopinath Jiu Thakur* [(1916) I.L.R. 44 Cal. 759: 44 I.A. 65: 32 M.L.J. 357 (P.C.)] applied.

Kameswar Pershad v. *Rajkumari Ruttan Koer* [(1892) L.R. 19 I.A. 234: I.L.R. 20 Cal. 79 (P.C.)] referred to.

Appeal against the decrees of the Court of the Subordinate Judge of Nellore in O.S. Nos. 12 and 13 of 1924.

G. Lakshmanna for appellants (defendants).

T. V. Venkatarama Aiyar and *T. V. Ramanatha Aiyar* for respondent (plaintiff) in Appeal No. 100 of 1925.

A. Krishnaswami Aiyar and *M. Venkatasubbiah* for respondent (plaintiff) in Appeal No. 101 of 1925.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS. *Kumaraswami Sastri, J.*—These appeals arise out of two suits filed on two mortgages executed by defendants 1 to 3, appellants, in favour of the plaintiff-respondent in each of the suits. The deeds were mortgage deeds without possession and they contain a personal covenant to pay the amount due on the mortgage. In each of the suits the plaintiff, after setting out the mortgage and the consideration, prayed for a decree for the amounts due. The plaintiff in Appeal No. 100 prayed for the usual mortgage decree for Rs. 38,975-8-9 with costs and further interest and the plaintiff in Appeal No. 101 for Rs. 39,515-15-8

*Appeals Nos. 100 and 101 of 1925. 19th April, 1928.

Chengalamma Garu v. Veeraraghava Naidu.

Kumaraswami Sastri, J.

with costs and further interest. Execution of the mortgage document was admitted by the defendants, but the defences raised were that the documents were not properly attested as required by law in that the attesting witnesses were not present when the executants executed the documents and that there was failure of consideration as regards a portion of the sums claimed, that the endorsements of payment by defendants 2 and 3 would not bind the 1st defendant so as to attract the provisions of the sections of the Limitation Act regarding acknowledgments of payment and that the personal remedy is barred as over 3 years have elapsed from the date of the mortgage documents. The Subordinate Judge overruled these objections and passed the usual mortgage decree in each of the suits and hence these appeals.

As regards the objection as to the mortgages being invalid as not having been properly attested, the Subordinate Judge declined to accept the evidence of P.Ws. 8 and 9, the attestors of the document, who state that they were not present when the deeds were executed. He accepted the evidence on the plaintiffs' side that they were present at the execution. As regards P.Ws. 8 and 9, it is clear from their evidence that they are not worthy of any credit when they say that they were not present when the documents were executed. As pointed out by the Subordinate Judge, both these witnesses were very reluctant witnesses for the plaintiffs. They had to be brought to Court under arrest. P.W. 9 is the karnam of the village which belongs to the 1st defendant. He is practically her servant. He says he is the karnam of Chittedu which belongs to the defendants. He says the writer of the document is his brother. When asked to say why he attested the documents not executed in his presence, he began by saying that he attested because he knew the signatures of the defendants and he says that the signatures in Exhibits A and D are those of defendants 1 to 3. He says his house is quite near the house of the defendants, being only a hundred yards off. Then he turns round and says he cannot say the signatures in Ex. D-1 are those of defendants 2 and 3, because he cannot identify the signatures. The Subordinate Judge rightly discredited the evidence of this witness. The other witness P.W. 10 who attested both the deeds is the Village Munsif of a village which belongs to the defendants. He also says that the documents were not signed in his presence. He began by saying that he can identify the signatures of defendants 2 and 3 but then he says he cannot say whether the signatures in Exs.

Chengalamma Garu v. Veeraraghava Naidu.

Kumaraswami Sastri, J.

H-1 and D-1 were theirs or not and that he cannot say they are not theirs. The defendants have not ventured to go into the witness-box to deny the statements of the plaintiff and his witnesses that the documents were executed by them in the presence of attesting witnesses, nor do they deny that they received full consideration. Having regard to these circumstances I see no reason to differ from the Subordinate Judge when he holds that the documents were properly attested.

The next question is whether there was any failure of consideration. Here again the Subordinate Judge points out that there was nothing in the evidence to show that there was any failure of consideration and Mr. Lakshmanna for the defendants states that he would not press this objection.

The important question which Mr. Lakshmanna argued in this case is whether in cases of registered mortgage bonds, the period of limitation for the personal covenant is 3 or 6 years. His contention is that even though the mortgage document was registered, the case falls under Art. 66 and not under Art. 116. The contention for the respondent is that in the case of registered documents Art. 116 in terms applies and that the suit is in time. I may state that as regards this question there are a series of cases in all the High Courts holding that a suit on a personal covenant in a registered mortgage document is governed by Art. 116 and that the 6 years' rule applies to such cases. I may refer to *Miller* v. *Runga Nath Moulick,*[1] which has been approved of by the Privy Council in *Ganesh Lal Pandit* v. *Khetra Mohan Mahapatra,*[2] *Rahmat Karim* v. *Abdul Karim,*[3] *Raja Ram Narain Singh* v. *Odindra Nath Mukerjee,*[4] *Rathnaswami* v. *Subramania,*[5] *Unichaman* v. *Ahmed Kutti Kayi,*[6] *Naubat Singh* v. *Indar Singh,*[7] *Jangi Singh* v. *Chandar Mal,*[8] *Lachmi Narain* v. *Turab-un-nissa*[9] and *Dinkar Hari* v. *Chhagan Lal Narsidas.*[10] The main contention of Mr. Lakshmanna is that the decision of their Lordships of the Privy Council in *Ram Din* v. *Kalka Prasad*[11] and

1. (1885) I.L.R. 12 C. 389.
2. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat 585: 51 M.L.J. 82 (P.C.).
3. (1907) I.L.R. 34 C. 672.
4. (1911) 17 C.W.N. 369.
5. (1887) I.L.R. 11 M. 56.
6. (1897) I.L.R. 21 M. 242: 8 M.L.J. 81.
7. (1890) I.L.R. 13 A. 200.
8. (1908) I.L.R. 30 A 388.
9. (1911) I.L.R. 34 A. 246.
10. (1913) I.L.R. 38 B. 177.
11. (1884) L.R. 12 I.A. 12: I.L.R. 7 A. 502 (P.C.).

Chengal-amma Garu v. Veera-raghava Naidu.

Kumara-swami Sastri, J

in *Ganesh Lal Pandit* v. *Khetra Mohan Mahapatra*[2] compel us to hold, notwithstanding the current of authority in the various High Courts, that the 3 years' rule applies, and it is necessary to see whether there is anything in these decisions which overrules the authorities above referred to and decides that the 3 years' rule applies in cases of registered mortgage documents. If there is, we are bound to follow the decisions whatever may be the views held by this and the other High Courts. I may point out that so far as the claim for personal remedy on a mortgage document is concerned, it is a claim which arises under the document which is registered. Mr. Lakshmanna's argument was that although the document might be registered as a mortgage, the registry only affects the immoveable property and the obligation to discharge the debt out of that property, and that so far as the personal covenant is concerned, it is not a claim on the registered document and he supports his argument by referring to the sections of the Registration Act which refer to the place of registration, namely the place where the property or some portion of it is situate, and contrasts this with the other provisions of the Act as regards registration of documents which do not affect immoveable property in which case the place of registration is where the parties desire it to be registered. I may point out that a mortgage document is registered under the provisions of the Transfer of Property Act. Section 59 of the Transfer of Property Act requires a mortgage document to be registered. Mortgages are defined in section 58 and certainly mortgages as defined include the covenant to pay the money secured on the property where such covenant exists. Where a document is required under section 59 to be registered, I find it difficult to see how any portion of the document can be said not to be registered for any purpose. What the law says is that a mortgage document as a whole has to be registered and not portions of it, and when a mortgage document is registered, it is difficult to say that the portion which contains the covenant to pay is not registered under the Act. The fact that the legislature has thought fit to define where documents are to be registered does not affect the question as to the registration of the document as a whole. It cannot be suggested that in all mortgage documents or documents containing several covenants, you have to register each portion of the document or each covenant separately in order

2. (1926) L.R. 53 I.A. 134. I.L.R. 5 Pat 585: 51 M.L.J. 82 (P.C.).

Chengalamma Garu v. Veeraraghava Naidu. — Kumaraswami Sastri, J.

to secure the benefit of the limitation as regards contracts. I do not see anything in the Registration Act which affects this question. After the decision of the Privy Council in *Tricomdas Cooverji* v. *Gopinath Jiu Thakur*[12] it is difficult to hold that the non-payment of a sum which a person agrees to pay is not a breach of contract in writing. So far as rents are concerned, their Lordships of the Privy Council in that case have expressly decided after a review of the scheme of the Law of Limitation that a claim for rent which is due under a registered rental agreement is governed by Art. 116. I find it difficult to draw any distinction between a claim for rent under a registered lease-deed and a claim for payment of interest under a registered mortgage deed. As regards mortgages, in addition to the cases I have already referred to of the various High Courts, the decision in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*[13] considers the question of limitation in such cases. Their Lordships negative the contention that the remedy on a personal covenant is governed by Art. 132 and that the 12 years' period of limitation can be availed of and state that the period of limitation would be 6 years. This is what their Lordships say:

"The first objection taken to the suit was that it was barred by the law of limitation *Prima facie,* this would be obvious, for the bond was by its terms made payable in the month of September 1875, whereas the right to sue the defendant for a personal debt would be limited to six years, and the present suit was not commenced until the month of January 1887, an interval of over 11 years The appellant, however, alleges that he comes within the limitation applicable to a charge on immoveable property, which would be 12 years; if he is right in that contention, the suit, being instituted 11 years and some months afterwards, is not barred. But it is necessary for the appellant to satisfy this Board that the charge upon the estate was one which was binding upon it, and, bearing in mind the facts of the earlier suit, and what was said by the Board in that case, their Lordships are not satisfied that it was so binding in fact. In this view, the period of six years, and not the period of 12 years, applies in this case, and the suit is consequently barred."

Then they deal with the other point as to whether the suit was barred by *res judicata.* It seems to me that on the facts of this case and having regard to these observations their Lordships of the Privy Council were of opinion that 6 years' rule was to be applied. As regards *Ram Din* v. *Kalka Prasad*[11] I do not see anything in that case which supports the view that the Privy Council have decided that 3 years is the period of limitation.

11 (1884) L.R. 12 I.A. 12: I.L.R. 7 A. 502 (P C).

12. (1916) I.L.R. 44 C. 759· 44 I.A. 65: 32 M.L.J. 357 (P C.).

13. (1892) L.R. 19 I.A. 234: I.L.R. 20 C. 79 (P.C.).

Chengalamma Garu v. Veeraraghava Naidu.

Kumaraswami Sastri, J.

There the question raised was whether Art. 132 applied to the personal remedy and they held that Art. 132 did not apply. Their Lordships say that the question for their Lordships' consideration is whether the lesser period of limitation 3, or 6 years as the case may be, has barred the personal remedy against the mortgagee, even though the mortgage remains in full force as against the mortgage property. The words, 3 or 6 years as the case may be, obviously refer to unregistered and registered mortgages. Later on their Lordships refer to the 6 years' rule as regards registered bonds. The head-note does not seem to be correct. They were dealing with the Act of 1871 in that case. In the case in *Ganesh Lal Pandit* v. *Khetra Mohan Mahapatra*[2] there are no doubt observations which suggest that their Lordships were of opinion that the 3 years' rule is applicable. I may point out that it is not clear from the facts of that case whether the mortgage document was properly registered and whether the claim was on a duly registered document. It is pointed out by their Lordships that the suit was filed 10 years after the debt became payable. Their Lordships of the Privy Council refer to and approve of *Miller* v. *Runga Nath Moulick*,[1] where the six years' rule was referred to. In the case in *Ganesh Lal Pandit* v. *Khetra Mohan Mahapatra*[2] it was not necessary for their Lordships of the Privy Council to decide whether the 3 years' or the 6 years' rule applied, as the suit would be barred even if the 6 years' rule was applicable and the contention was that 12 years' rule applied. There was no question in the case as to whether the 3 years' or the 6 years' rule applied. We also find that the respondents were not represented. I do not think that until there is a clear pronouncement by their Lordships overruling the series of cases which I have referred to, their Lordships can, by reason of the observation in *Ganesh Lal Pandit* v. *Khetra Mohan Mahapatra*,[2] be said to have altered the current of authority and to have determined that in suits on registered mortgages, 3 years' rule is the one applicable, especially as we cannot on any principle distinguish the decision in *Tricomdas Cooverji* v. *Gopinath Jiu Thakur*[12] dealing with claims on registered rent deeds from those on registered mortgages and as we find the decision in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*[13] expressly states that 6 years' rule is applicable I think that Art. 116

1. (1885) I.L.R. 12 C. 389.
2. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat 585: 51 M.L.J. 82 (P.C.).
12. (1916) I.L.R. 44 C. 759: 44 I.A. 65: 32 M.L.J. 357 (P.C.).
13. (1892) L.R. 19 I.A. 234: I.L.R. 20 C. 79 (P.C.).

Chengalamma Garu v. Veeraraghava Naidu.

Reilly, J.

applies to mortgages and to personal remedies under mortgages which are registered and that the present claim is not barred by limitation.

The appeals fail and are dismissed with costs.

Reilly, J.—I agree that in this case we should not be justified in differing from the finding of the learned Subordinate Judge that the mortgages were validly executed and attested. Mr. Lakshmanna himself does not press the contention that there was any failure of consideration.

The important and interesting point in these appeals is the question of limitation raised by Mr. Lakshmanna. He contends that the period of limitation to be applied to the personal covenants in connection with these mortgages on the part of defendants 2 and 3 is only 3 years under Art. 66 of the Limitation Act, not 6 years under Art. 116, although those personal covenants are contained in the registered mortgage deeds. One way in which Mr. Lakshmanna has tried to support his contention is by representing that these personal covenants, although they are included in registered mortgage deeds, have not themselves been registered. He asks us to accept the theory that these documents were registered because they were mortgages: incidentally it happened that personal covenants were set out in them; but there was no necessity to register the personal covenants, and therefore we must confine the effect of the registration to the mortgages embodied in the documents and say that the personal covenants were not in effect registered at all. I do not think that we can deal with registered documents in that way. The reason why these documents were registered was no doubt that they were mortgage documents: but, once they were registered, each was registered as a whole, and every covenant contained in them was also registered. I do not see how we can get away from that fact or invent a theory that there may be a kind of registration which is no registration. Now, if these personal covenants are registered covenants, then according to a long series of cases quoted by my learned brother, of this Court, the Calcutta High Court, the Allahabad High Court and the Bombay High Court, the period of limitation applicable is 6 years under Art. 116, not 3 years under Art. 66, and we find that there is the authority of their Lordships of the Privy Council in *Kameswar Pershad* v. *Rajkumari Ruttan Koer*[13] supporting that view of the matter. The same principle, though

13. (1892) L.R. 19 I.A. 234: I.L.R. 20 C. 79 (P.C.).

Chengalamma Garu v. Veeraraghava Naidu.

Reilly, J.

not applied exactly to the same matter, is to be found in another decision of their Lordships, *Tricomdas Cooverji* v. *Gopinath Jiu Thakur.*[12] Mr. Lakshmanna has quoted an earlier decision of their Lordships, *Ram Din* v. *Kalka Prasad,*[11] as if it supported his case; if we look into that case, we find that even there their Lordships recognised that the period of limitation for a personal covenant might in some cases be 3 years and in some cases 6 years. The obvious meaning of what they said, I take it, is that it would be 3 years if the document were not registered and 6 years if it were registered. The trouble in the present case arises from the recent judgment of their Lordships in *Ganesh Lal Pandit* v. *Khetra Mohan Mahapatra.*[2] In that case there is a reference to *Ram Din's case,*[11] as if it decided, as Mr. Lakshmanna represents, that the period of limitation was only 3 years. I must confess that I find it a little difficult to follow the reference to *Ram Din's case*[11] in this recent decision. What is actually said in quoting *Ram Din's case*[11] is that it was held by the Privy Council that, when a mortgagee sues on a personal covenant to make the mortgagor responsible for any deficiency in the realisation of the mortgage-debt out of the mortgage properties, the claim would be barred in 3 years. That would have been the case if the mortgage deed had not been registered; and it was possible at the time to which the decision in *Ram Din's case*[11] related that some mortgage deeds would not be registered. But further on in this recent decision we find their Lordships of the Privy Council quoting *Miller* v. *Runga Nath Moulick*[1] with approval. They not only mention that case with approval, they quote a long passage from it *in extenso,* and that passage ends with the words:

"The claim to make the defendants personally liable has, therefore, been rightly held to be barred by limitation, the present suit having been commenced more than six years after the accrual of the cause of action."

There it is quite clear the learned Judges of the Calcutta High Court took the view that the period of limitation was 6 years, and their Lordships in this very case, on which Mr. Lakshmanna so much relies, appear to approve of that. They quote the statement without any dissent whatever. In the next paragraph it is true they go on to say that in the case with which they

1. (1885) I.L.R. 12 C. 389.
2. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C).
11. (1884) L.R. 12 I.A. 12: I.L.R. 7 A. 502 (P.C).
12. (1916) I.L.R. 44 C. 759: 44 I.A. 65: 32 M.L.J. 357 (P.C).

Chengal-amma Garu v. Veera-raghava Naidu.

Reilly, J.

are dealing Art. 66 and a period of 3 years apply. What they say is:

"The cause of action on the personal covenant accrued to Behari Lal Pandit when Suryamani failed to pay the mortgage-debt, *viz.*, within six months from the date of the mortgage. And the claim had become barred under Art. 66 long before the execution of the razinama and the conveyance thereunder."

Now at first sight that looks as if their Lordships were dissenting from the long series of cases in the Indian High Courts which I have mentioned and from their previous decisions in this matter. The question was not one of any moment in *Ganesh Lal Pandit's case*[2] because the time for payment under the present covenant in that particular case occurred in 1885 and, therefore, whether the period of limitation was 3 years or 6 years, it was all very ancient history, which could not affect the result of the case. But the statement that Art. 66 applies is certainly a puzzling one, and it would be very difficult for us to reconcile it with a long series of decisions in the Indian High Courts and with their Lordships' own earlier pronouncements, if we were assured that the mortgage deed with which they were dealing in that particular case had been validly registered. Unfortunately, we have not got the facts of that case before us. The judgment of their Lordships starts by saying that it is unnecessary to set out the facts at length because they have been set out very clearly in the judgment of the High Court which was under appeal. But it does appear from an early passage in their Lordships' judgment that there was something wrong with the mortgage deed then in question. It had some taint of invalidity, though what exactly is not clear. Their Lordships say:

"They (that is the Judges of the High Court) have also held that the principal mortgage purporting to have been executed by Suryamani was not executed in compliance with the provisions of the law so as to make it binding on Suryamani."

It would be very interesting and profitable for us to know exactly what was wrong with that mortgage; but I suspect it had something to do with a defect in registration. If we go a little further in their Lordships' judgment, we find that Suryamani had executed a power-of-attorney in favour of a man called Lakhan Mahanty authorising him to execute and register this mortgage-deed and also to execute and register a sale-deed. In the end it appears she executed the mortgage-deed herself but

2. (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat 585: 51 M.L.J. 82 (P.C.).

Chengalamma Garu v. Veeraraghava Naidu.

Reilly, J.

Lakhan Mahanty purported to execute the sale-deed on her behalf, and their Lordships find that his execution of the sale-deed on her behalf was invalid because there was a defect in his power-of-attorney. It does not appear to me at all improbable that the mortgage-deed was presented for registration by Lakhan Mahanty, as was intended by Suryamani, and, if that was so and if the power-of-attorney was defective, then the registration was invalid. It happened that on that mortgage there was a suit in 1896, in which the mortgagee obtained an *ex parte* decree, and in execution of that decree the property was brought to sale. But that also was ancient history into which their Lordships did not think it necessary to go for the disposal of the case before them. It will be seen that there was something wrong with the mortgage-deed in question in that case, and there is at least some reason to suppose that what was wrong was that it was invalidly registered. Now, when their Lordships have made a statement that the period of limitation for a personal covenant in a mortgage-deed is 3 years instead of 6 years, as had been almost uniformly held before, and have not discussed the matter in detail, but have merely stated it as a fact applying to that particular case, it appears to me to be more reasonable to suppose that they did so because the mortgage-deed then before them was invalidly registered than that they intended to upset the law as understood in this country on a question of great importance generally, though of no consequence in the case before them, without stating their reasons far more elaborately than has been done in that case. I think there is good reason to suppose that *Ganesh Lal Pandit's case*[2] is not really an authority for the proposition for which Mr. Lakshmanna wishes to use it, namely, that the period of limitation for a personal bond embodied in a registered mortgage-deed is 3 years under Art. 66 instead of, as previously held, 6 years under Art. 116.

I agree, therefore, that both these appeals must be dismissed with costs.

N.S. *Appeals dismissed.*

---

2 (1926) L.R. 53 I.A. 134: I.L.R. 5 Pat. 585: 51 M.L.J. 82 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* AND MR. JUSTICE PAKENHAM WALSH.

Gnanambal Ammal .. *Petitioner** (*Petr.*).

Gnanambal Ammal, *In re.*

Criminal Procedure Code (V of 1898), Ss. 488, 490—Maintenance—Order for—Enforcement of—Court which made the order—Power and duty of.

An application to enforce an order for maintenance must be entertained and disposed of by the Court which made the order.

Where such an application was made to the Court which made the order, but the Magistrate rejected it on the ground that the applicant (wife) must get it enforced by the Court within whose jurisdiction the husband then resided; *held* that the Magistrate acted illegally in doing so.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the First Class Sub-divisional Magistrate of Mayavaram, N. Dis. No. 42 of 1928, dated 17th April, 1928, returning the application of the petitioner for the collection of arrears of maintenance due to her from the respondent under the order of the High Court, dated 24th September, 1924, and passed in Criminal Revision Case No. 862 of 1923 (M.C. No. 15 of 1922 on the file of the Court of the Sub-divisional Magistrate of Mayavaram).

K. Sankara Sastri for petitioner.

The Public Prosecutor for the Crown.

The Court made the following

ORDER.—This woman got an order for maintenance against her husband from the Court of Mayavaram. Her husband fell into arrears as they generally do and she then went to the Mayavaram Court to get the order enforced. The Magistrate for some reason which it is difficult to fathom said he was not going to enforce the order although it was made in his own Court but she must get it enforced by the Court within whose jurisdiction the husband then resided. It would be intolerable that such a burden should be put upon holders of maintenance orders. They would have to rush about the country pursuing the absconding husband, it may be, to wherever he chooses to go before the order could be enforced. We upset the order of the Magistrate and direct that a warrant for the amount issue.

A.S.V. *Order set aside.*

---

*Cr R.C. No. 451 of 1928. 31st July, 1928.
(Cr.R.P. No. 367 of 1928.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Vanama Akkayya .. *Petitioner* in C.M.P. No. 4396 and Respt. in C.M.P. No. 4429 of 1927*

v.

Vanama Lakshmamma .. *Respondent in C.M.P. No. 4396 of 1927 and Petnr. in C.M.P. No. 4429 of 1927.*

Akkayya v. Lakshmamma

Indian Succession Act (1925), S. 302, (old Act) S. 264-B—Application under—Power and jurisdiction of High Court in—Same as that of Court of Chancery in England under O. 55, R. 3—Decision of Civil Court on a particular matter—Interference with, by directions given under S. 264-B—Jurisdiction—Discretion—Hindu widow—Possession of whole of corpus of estate in default of adoption—Right to—Executor's right to resist.

Section 302 of the new Succession Act gives ample power to the Court to settle questions arising between the executor and the legatees themselves and also power to construe a will whenever the Court is asked to do so. Under the section the High Court has power to give the directions which the Court of Chancery in England has under O. 55, R. 3 of the Supreme Court Rules.

When a matter has been properly litigated in a Civil Court and has been adjudicated upon, the High Court will be very reluctant to give directions under S. 302 which would in any way conflict with the judgment between the parties already arrived at. Though it has jurisdiction to go into the matter, it should, in cases where the matter has been definitely settled in a properly constituted suit, hold its hands.

An executor who is only asked to be in possession for a time is not entitled to hold on to the property on the ground that an uncertain event is likely to happen.

The will of a Hindu gave power to his wife to adopt and directed the executor (petitioner) to pay a certain amount to the widow for maintenance and to be in management of the estate. The widow did not make an adoption, and for several years the executor did not carry out the provisions of the will as regards payment of maintenance to the widow. Thereupon the widow obtained a decree against the petitioner, whereby he was to put her in possession of the house mentioned in the will and to pay her the sum which was found to be due by him to the estate. He put her in possession of the house, deposited the amount payable by him in the District Court, and applied to the High Court under S. 302 of the Succession Act for directions as to the handing over of the amount to the widow, his contention being that a certain charity was directed to be performed by the will and that he was entitled to retain the whole or a portion of the corpus for the purpose of carrying out the trust.

---

*C.M.Ps. Nos. 4396 and 4429 of 1927. 21st November, 1927.

Akkayya v. Lakshmamma.

Held, that, in the absence of an adoption, the widow was entitled to the whole of the corpus of the estate, the question of carrying out the trust being left to her, and that the petitioner was not entitled to retain any portion of the corpus.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue such general or special directions to the estate of Subba Rao (subject-matter of O.P. No. 24 of 1927 on the file of the District Court of Kistna) in regard to the administration thereof and to issue an injunction restraining the respondent herein from executing the decree in O.S. No. 65 of 1925 on the file of the Court of the Subordinate Judge of Bezwada and petition praying that in the circumstances stated in the counter-affidavit filed in C.M.P. No. 4396 of 1927 the High Court will be pleased to vacate the interim stay order, dated 11th November, 1927 and made in C.M.P. No. 4396 of 1927.

Ch. Raghava Rao and *V. Pattabhirama Sastriar* for petitioner.

P. Satyanarayana Rao for respondent.

The Court made the following

ORDER.—This is an application under section 302 of the Indian Succession Act praying for the issue of general or special instructions in regard to the administration of an estate and for an injunction restraining the respondent herein from executing the decree in O.S. No. 65 of 1925 on the file of the Sub-Court, Bezwada and such other order or orders as this Court may deem fit to pass.

One Subba Rao died on the 13th November, 1920. He executed a will on the 11th November, 1920 giving power to his wife to adopt a boy and directing the executor to pay a certain amount to her for maintenance and for the management of the estate. The executor who is the petitioner did not put the respondent in possession of a portion of a house mentioned in paragraph 3 of the will and did not give her maintenance for a considerable time; in consequence of which she was obliged to file O.S. No. 65 of 1925 for the recovery of the whole of the property as the widow of the deceased Subba Rao. The suit was resisted on various grounds and the Subordinate Judge passed a preliminary decree in favour of the respondent overruling the objections of the petitioner. An account was taken and a large amount was found due and both the petitioner and the respondent entered into a compromise under which it was arranged that Rs. 9,000 should be paid

Akkayya v. Lakshmamma.

to the respondent as being the amount due to the estate in the possession of the executor. She has obtained possession of the portion of the house mentioned in the will.

The petitioner has deposited the amount of Rs. 9,000 into the District Court at Guntur and has come up here for the directions of this Court as regards the handing over of the amount to her and as regards the amount that should be allowed to remain in his hands for the performance of some charity.

Mr. Satyanarayana for the respondent raised a preliminary objection that an application under section 302 does not lie in this case. His argument is that the Court can only be asked to give advice to the executor, but when the right of the respondent to receive the whole of the estate is disputed, this Court has no jurisdiction to give any directions under S. 302 and he relies upon *In re Lorenz's Settlement*,[1] *In re Samuel Marie Brereton*[2] and *In re Lakshmibai*.[3] No doubt under section 30 of 22 and 23 Vict. c. 35 the Court had no jurisdiction to decide upon the conflicting claims of parties claiming under a will. The relevant portion of section 30 is as follows:

"Any trustee, executor, administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court of Chancery or by a summons upon a written statement to such Judge in Chambers for the opinion, advice or direction of such Judge on any question respecting the management or administration of trust property or the assets of any testator or intestate."

The section is clear that what is asked for is the opinion, advice or direction of the Judge. It was held that under this section the Court of Chancery had no power to give a decision upon contested questions and upon conflicting claims. In *In re Lorenz's Settlement*[1] it was said:

"The Court will not, upon a petition presented by a trustee or executor under the 38th section of the 22 and 23 Vict. c. 35, for the opinion, advice or direction of the Court, construe an instrument or make an order affecting the rights of parties to property. Such petitions should relate only to the management and investment of trust property."

Kindersley, V.C., observed at page 434:

"My understanding of that section of the Act is that it was intended by the Legislature that the Court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those

1. (1861) 62 E.R. 433.
2. (1883) I.L.R. 7 B 381.
3. (1888) I.L.R. 12 B. 638.

Akkayya v. Lakshmamma.

parties *inter se*, otherwise the effect would be that a deed or will involving the most difficult questions, and relating to property to an amount however large, might be construed, and most important rights of parties decided, by a single Judge, without any power of appeal whatever."

The jurisdiction of the Court of Chancery under 22 and 23 Vict. c. 35, section 30 or 38 was only advisory. This provision in 22 and 23 Vict. c. 35 was enacted in section 43 of the Trustees' and Mortgagees' Powers Act (XXVIII of 1866). Under S. 43 any trustee, executor or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for opinion, advice or direction of such Judge on any question respecting the management or administration of the trust property or the assets of the testator or intestate. In *In re Samuel Marie Brereton*[2] it was held by a Judge sitting on the Original Side that section 43 did not empower the Court to decide any question of considerable difficulty and importance. Mr. Justice Latham relied upon the observation of Kindersley, V.C., in *In re Lorenz's Settlement*[1] quoted above and held

"that the Court should not deal, under the power here given, with a point of law, like the present one, on which so much may depend, and which is in itself so full of difficulty."

This case was followed in *In re Lakshmibai.*[3] In that case also an application was made under section 43 of the Trustees' and Mortgagees' Powers Act of 1866 praying (1) that the trustee might be advised whether she had power to grant the proposed lease, (2) whether the Court will sanction or direct the said lease, and (3) that the Court will advise in the premises as may seem fit. Mr. Justice Scott observed at page 644:

"The questions on which the Court has advised trustees have related strictly to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings. But disputed points of law or fact have never been included. The Court will not, for instance, construe an instrument or make any order affecting the rights of parties."

These cases have no application to proceedings under S. 302. This section was enacted in the year 1919 as section 264-B of the Indian Succession Act and section 87-B of the Probate and Administration Act. It is now embodied in the new Act as section 302. Under this section, the Court has got power on an application made to it to give to the executor or administrator

1. (1861) 62 E.R. 433.
2. (1883) I.L.R. 7 B. 381.
3. (1888) I.L.R. 12 B. 638.

Akkayya v. Lakshmamma.

any general or special directions in regard to the estate or its administration. "Any directions as regards the administration of an estate" means such directions as the executor may seek in order to administer the estate properly. This section gives ample power to the Court to settle questions arising between the executor and the legatees and between the legatees themselves and also power to construe a will whenever the Court is asked to do so. It is difficult to hold that the Legislature when it enacted section 264-B in the year 1919 overlooked the well-known English practice which has been prevailing in the Court of Chancery for the last so many years. The Court of Chancery has full power to give directions as regards the administration of an estate, whether an application is made to it by the executor or by the administrator or by the legatee or other person interested in it. Order 55, Rule 3 (*g*) is as follows: "The determination of any question arising in the administration of the estate or trust.". That is wide enough and I do not think the language of section 302 cuts down the power of the Court. In *Conway* v. *Fenton*[4] Mr. Justice Kekewich observed at page 515:

> "The question is raised on an originating summons under Order 55, Rule 3 (*e*). The object of that order was to enable trustees or persons beneficially interested under a settlement or will to come by summary mode to the Court and to obtain the determination of any question, whether of administration, or of law, or of construction, without the necessity of what used to be known as an administration suit or action. I take it that, for all purposes, or almost all purposes, the Court is precisely in the same position on the hearing of an originating summons as if there were really an administration action properly constituted, and that I have precisely the same jurisdiction under an originating summons as I should have in an administration action—neither more nor less."

I hold that the High Court has power under section 302 to give the directions which the Court of Chancery in England has under Order 55, Rule 3.

The next point urged by Mr. Satyanarayana is that the matter between the parties has been concluded by the judgment of the Subordinate Judge and therefore this Court cannot give directions in variance with the judgment of the Subordinate Judge. When a matter has been properly litigated in a Civil Court and has been adjudicated upon, this Court will be very reluctant to give directions which would in any way conflict with the judgment between the parties already arrived at.

4. (1888) 40 Ch. D. 512.

Akkayya v. Lakshmamma.

Though this Court had jurisdiction to go into the matter, it should, in cases where the matter has been definitely settled in a properly constituted suit, hold its hands. But the question that is now raised before me was not disposed of in the Lower Court, for Mr. Raghava Rao raised the question whether he is entitled to hold a certain sum of money in his hands for the performance of a trust which he says has been constituted under the will. The following passage in the will is relied upon as having created a trust and as having appointed the petitioner the trustee for performing the charity mentioned in that passage:

"So long as the said amount remaining after excluding the amount paid for maintenance to my wife from out of my property continues, I have authorised my junior uncle, Vanama Akkayya Garu to give provisions rice, dholl, tamarind, etc., to two guests once a day from to-day onwards."

Mr. Raghava Rao's contention is that this clause in the will establishes a trust in favour of charity and consequently it constitutes the petitioner a trustee for carrying out the terms of the trust. It is unnecessary in the view I take to consider whether this clause creates a proper trust for the feeding of two guests. The amount that is to be spent on the feeding of guests is not mentioned and there is nothing in the will itself to show what portion of the property should be set apart for feeding two guests a day.

The question that requires decision is whether the petitioner is entitled to keep the whole or any portion of the corpus in his hands for the purpose of carrying out the trust. The contention is that till a boy is adopted and till he attains majority he is entitled to keep a portion of the corpus in his hands for feeding guests. The widow may or may not adopt and if no adoption takes place there could be no boy who can come to maturity. The petitioner, according to Mr. Raghava Rao's contention, is entitled to keep the money till the boy attains majority. If that is so, seeing that there is no boy and there is no likelihood of the widow adopting a boy, I fail to see how he can keep any portion of the corpus for the performance of charity. If a boy is adopted, on his attaining majority the charity should be performed by him. If no boy is adopted, the widow if she likes may give effect to the intention of the testator as regards charity but I fail to see how an executor who is only asked to be in possession for a time can hold on to the property on the ground that an uncertain event was likely to happen. It is clear that a bequest in favour of a person not in existence at the time of the testator's death, when there is no intervening life-interest

Akkayya v. Lakshmamma.

before the expiration of which he could come into existence is void but that will not give a right to the executor to hold on to the property indefinitely. The petitioner is only an executor and he having invoked the provisions of section 302 is bound by the directions of this Court. Seeing that the respondent has obtained a decree for the whole of the amount in a civil suit he is not entitled to keep any money in his hands for the purpose of carrying out the objects of the charitable trust. He being an executor must render an account to the Court and must hand over the property to the person entitled to it. The widow not having adopted a boy is entitled to the whole of the corpus. No doubt if she adopts a boy according to the terms of the will, she would be entitled to maintenance according to the terms of the will and the corpus would go to the adopted boy. The executor is not entitled to keep any portion of the corpus in his hands in the hope a boy would be adopted to the testator. My direction, therefore, is that the petitioner should hand over the whole of the corpus to the respondent and should not raise any objection to doing so in the capacity as executor.

I am satisfied that this applic[illegible] *fide* one, for, the petitioner having fought the respondent in the Bapatla Sub-Court and having been worsted there has thought of putting obstacles in her way by making this application. I therefore direct him to pay personally the costs of this application and vakil's fee Rs. 100.

A.S.V. *Petition dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD PHILLIMORE, LORD BLANESBURGH AND MR. AMEER ALI.

Ardeshir H. Mama .. *Appellant** (*Plff.*)

v.

Flora Sassoon .. *Respondent* (*Deft.*)

Specific Relief Act, Part II, Chapter II—Codification—Basis of—English system at the time—Account—of—Reference to, for interpreting sections in Chapter II, Part II of Act—Permissibility.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Chapter II of Part II of the Specific Relief Act is a codification with modifications deemed to be called for by Indian conditions and procedure

---

*P.C. Appeal No. 100 of 1926. 21st May, 1928.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

of the then existing rules and practice of the English Law in relation to the doctrine of Specific Performance. It will aid the interpretation of the relevant sections in the chapter to have in mind what the English system on which the Specific Relief Act is based was in its origin and in its fullness at the date of codification.

Account of the English system at the date of the Specific Relief Act.

Specific Performance—Suit for—Readiness and willingness of plaintiff to perform his part of contract—Averment and proof of—Necessity—English Law—Specific Relief Act—Law under

Under the English Law, the plaintiff, in a suit for specific performance, must allege, and, if necessary, prove, a continuous readiness and willingness, from the date of contract to the time of the hearing, to perform the contract on his part. Though there is no express statement in the Specific Relief Act to that effect, such an averment of readiness and willingness is equally necessary in an Indian suit for specific performance.

Specific Relief Act, S. 19—Specific Performance—Suit for—Compensation for breach of contract in—Award of—Power of—Plaintiff debarred at hearing by his own action from asking for specific decree—Effect—Dismissal of suit in case of.

Except as to the case provided for in the explanation (to S. 19 of the Specific Relief Act)—as to which there is introduced an express divergence from Lord Cairn's Act of 1858, as expounded in England—S. 19 of the Specific Relief Act embodies the same principle as Lord Cairn's Act, and does not any more than did the English Statute enable the Court in a specific performance suit to award "compensation for its breach" where at the hearing the plaintiff has debarred himself by his own action from asking for a specific decree.

In a purchaser's suit for specific performance with an alternative claim for damages conditioned just as it is conditioned in S. 19 of the Specific Relief Act, the plaintiff, nine months or more before the trial, wrote a letter formally notifying the defendant to the effect that he had decided to abandon his claim for specific performance, and that he would, instead, at the trial claim damages against the defendant for her breach of contract.

Held, that there was after that letter no power left in the Trial Judge, without an apt and sufficient amendment of the plaint, to award the plaintiff at the hearing any relief at all, and that he had no power to award damages

Specific Performance—Suit by purchaser for, with claim for damages for breach of contract additional or alternative—Conversion of, into suit for damages simpliciter*—Amendment of plaint for purpose of—What amounts to.*

A purchaser sued for the specific performance of a contract for the sale of immoveable property with claims for damages additional or alternative all in terms of S. 19 of the Specific Relief Act. During the pendency of the suit, the plaintiff amended his plaint, his object in doing so evidently being to convert the suit into one for damages for breach of the contract *simpliciter*. But the amended plaint retained the paragraph in the original plaint, which alleged that the plaintiff "is as he has been throughout ready and willing to perform his said contract", and it also retained the claim for specific performance.

P.C.

Ardeshir H Mama v. Flora Sassoon.

Held, that the amendment, when properly construed, did not operate to convert the suit into one for the recovery of damages for breach of the contract *simpliciter*

Specific Performance—Suit by purchaser for, with claim for damages for breach additional or alternative—Amendment of plaint in, so as to convert suit into one for damages simpliciter*—Jurisdiction to allow, at hearing—S 29 of Specific Relief Act—Effect—Discretion in allowing amendment—Exercise of—Principles guiding.*

S. 29 of Specific Relief Act, which makes the dismissal of a suit for specific performance of a contract a bar to a right to sue for compensation for breach, implies that, prior to such dismissal, the right is not barred. A suit for specific performance of a contract with claims for damages additional or alternative all in terms of S. 19 of the Specific Relief Act may, therefore, in a proper case, be allowed to be amended at its hearing into one for damages *simpliciter*. The power to allow such an amendment is, however, one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effect upon the position both of the plaintiff and the defendant Indeed so serious in many cases is the exercise of this power that it would be a wise precaution for a Judge before allowing any such amendment in a contested case to require the plaint to be actually re-modelled in a form appropriate to an action seeking compensation for breach of contract and nothing else.

Practice—Question of—Certainty on—Necessity—Rule of practice, statutory—Alteration of, when inconvenient—Power of competent authority as regards.

On a question of practice certainty is more important than anything else A rule of practice, even if it be statutory, can, when found to be inconvenient, be altered by competent authority. Uncertainty in such a matter is at best an embarrassment and may at the worst be a source of injustice, which, in some cases, may be beyond judicial remedy.

Specific Performance—Agent—Contract by vendor—Purchaser's suit for specific performance of—Authority of agent—Proof of—Onus on purchaser.

In a suit by a purchaser for the specific performance of a contract alleged to have been entered into by a third party on behalf of the defendant, the onus is on the plaintiff to prove that the contract sued on is binding on the defendant and that its terms were authorised by the defendant.

Appeal No. 100 of 1926 from a decree of the High Court of Judicature at Bombay (Sir Norman MacLeod, Chief Justice and Mr. Justice Coyajee), dated the 5th October, 1925 reversing in part a decree of a single Judge of that Court (Mr. Justice Mirza), dated the 22nd January, 1925.

The material facts of the case appear sufficiently from their Lordships' judgment. The case in the High Court is reported in 28 Bom. L.R. 126.

Upjohn, K.C. and *Meyrick Beebee* for appellant.

Maugham, K.C., Lowndes, K.C. and *Raikes* for respondent.

P. C.
—
Ardeshir H Mama v. Flora Sassoon.

The following cases were cited and discussed during the argument:—

Fraser & Co. v. *The Bombay Ice Manufacturing Company,*[1] *Karsandas* v. *Chhotalal,*[2] *Hipgrave* v. *Case,*[3] *Ranchhod* v. *Manmohandas,*[4] *Callianji Harjivan* v. *Narsi Tricum,*[5] *Hawksley* v. *Outram,*[6] *Nabinchandra Saha Paramanick* v. *Krishna Barana Dasi,*[7] *Adikesavan Naidu* v. *Gurunatha Chetti,*[8] *Wilson* v. *Northampton and Banbury Junction Railway Co.,*[9] *Engel* v. *Fitch,*[10] *Engel* v. *Fitch,*[11] *Ferguson* v. *Wilson,*[12] *Tamplin* v. *James,*[13] *Jamal* v. *Moolla Dawood Sons & Co.,*[14] *Hadley* v. *Baxendale,*[15] and *Cory* v. *Thames Ironworks Company.*[16]

21st May, 1928. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—This suit, commenced on the 10th January, 1920, in the High Court of Judicature at Bombay was, in its inception, a simple action by a purchaser for the specific performance of a contract for the sale of certain valuable hereditaments on Malabar Hill in Bombay with claims for damages additional or alternative all in terms of section 19 of the Specific Relief Act, 1877. The defences to the suit were that there never had been any concluded contract for the sale of the property; if there had been such a contract it had been entered into on behalf of the defendant by an agent with no authority to bind her to its terms. There is in the defendant's written statement no suggestion that the plaintiff's right was not a right to specific relief, if any existent contract binding upon the defendant was established. And the case, indeed, was one in which upon proof by the plaintiff of the facts alleged by him, he became entitled as of right under section 12 (*c*) of the Act to the specific relief which he sought.

But that right of the plaintiff would be dependent upon his having been himself up to the date of decree ready and willing to perform the contract on his part and in para. 9 of his plaint he alleged that he had throughout been so ready and willing:

1. (1904) I.L.R. 29 B 107 at 125, 126.
2. (1923) 25 Bom. L.R. 1037.
3. (1885) 28 Ch D. 356.
4. (1907) I.L.R. 32 B 165.
5. (1895) I.L.R. 19 B. 764.
6. (1892) 3 Ch. 359
7. (1911) I.L.R. 38 C. 458.
8. (1916) I.L.R. 40 M. 338: 32 M.L.J. 180 (F.B.).
9. (1874) 9 Ch. App. 279.
10. (1868) L.R. 3 Q.B. 314.
11. (1869) 4 Q B. 659.
12. (1866) 2 Ch. App. 77.
13. (1880) 15 Ch.D. 215, 223.
14. (1915) I.L.R. 43 C. 493: 43 I.A. 6: 30 M.L.J. 71 (P.C.).
15. (1854) 9 Exch. 341: 23 L.J. Ex 179.
16. (1868) 3 Q.B. 181.

P. C.
Ardeshir H. Mama v. Flora Sassoon.
Lord Blanesburgh.

an allegation which imports a continuous readiness and willingness up to the time of the hearing. *See* per Lord Selborne, in *Hipgrave* v. *Case*[3]

On the 19th March, 1924, nine months or more before the trial, the plaintiff's solicitors formally notified the defendant to the effect that the plaintiff had decided to abandon his claim for specific performance: that he would, instead, at the trial claim damages against the defendant for her breach of contract, and that he assessed these damages at Rs. 7 lacs. By that time, the plaintiff as explained to the Board by his counsel, had found it inconvenient any longer to retain in readiness for completion of the purchase the money payable under the contract, and this was the explanation of his decision to convert his claim against the defendant into one of a character which could be successfully maintained without further financial strain upon himself. Their Lordships do not doubt the correctness of this statement, but they are not convinced that the glittering prospect of very heavy damages claimable in the special circumstances of the case may not largely have influenced the plaintiff's decision.

He did not, before the trial, make any application to amend his pleadings. The view of his advisers apparently was that he could maintain his new claim for damages on his plaint as it stood. But, on objection taken at the trial that this was not possible, the plaintiff's counsel then sought, and in spite of opposition, was permitted by the learned Judge to make in his plaint an amendment presumably designed, whether effectively is another matter, to convert the suit into one for damages for breach of contract only. And it was upon that footing that the trial proceeded, and the learned Judge being ultimately of opinion that there did exist a concluded contract for sale duly authorised by, and accordingly binding upon the defendant, and that that contract had been repudiated by her, made a decree dated the 22nd January, 1925, by which he ordered the defendant to return the deposit paid by the plaintiff, and further awarded the plaintiff, according to a measure which he explained in his judgment, the sum of Rs. 7 lacs as damages for the defendant's breach of contract.

The defendant appealed to the High Court in its appellate jurisdiction. The appeal was successful. That Court held that the defendant's agent had not been shown to have had authority to bind her by the contract alleged, and by decree dated 5th of

3. (1885) 28 Ch. D. 356 at 361.

P. C.
Ardeshir H. Mama v. Flora Sassoon
Lord Blanesburgh.

October, 1925, it discharged with the costs of appeal the order of the Trial Judge except as to the return of the deposit, leaving each party to bear his or her costs of suit in the Court of first instance.

It is from this decree that the plaintiff now appeals. In addition, however, to the ground just stated on which that decree was based, a point of great importance was broached by the Chief Justice of Bombay who presided. He posed the question whether even if the Court had agreed with the learned Trial Judge that there was in existence a binding contract for sale, his award of damages would not still have had to be set aside for the reason that as the plaintiff had by his solicitor's letter of the 19th of March, 1924, in effect intimated that he was no longer either willing or ready to perform the contract on his part the plaintiff had not only thereby renounced, but as from that moment had disentitled himself to a decree for specific performance, and had thus brought upon himself the untoward consequence that there was under the statute in the circumstances of the case no power left in the Trial Judge to award him in the suit any damages at all.

In his argument before the Board counsel for the respondent placed this view of the matter in the forefront of his argument and it was fully dealt with by Mr. Upjohn in his reply for the appellant. In these circumstances their Lordships think, that whether or not this appeal can be disposed of without further reference to it, they ought to express their views upon so important a question of practice now that it has been raised and fully argued. In such a matter certainty is more important than anything else. A rule of practice, even if it be statutory, can when found to be inconvenient be altered by competent authority. Uncertainty in such a matter is at best an embarrassment and may at its worst be a source of injustice which, in some cases, may be beyond judicial remedy. Accordingly in this judgment, their Lordships will deal with all the matters in controversy to which they have referred, irrespective of the question whether the last of them of necessity now calls for determination at their hand.

The respondent is the widow of a Bombay merchant. She was at the time of the transaction in debate resident in England. She then owned a valuable property on Malabar Hill, Bombay, bounded on the north by Gibbs Road, on the east by Ridge Road, on the south by Nepean Road and on the west by the properties

P. C

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

of a Mr. Dubash and His Exalted Highness the Nizam of Hyderabad. The property consisted of two residences—a large house and grounds in its north-east corner, known as "Il Palazzo": a smaller adjoining house or bungalow and grounds in its south-east corner known as "Nepean House," with vacant land to the west, in front of the curtilages of both houses, and separated from each by a wall built in a direct line across the property from Nepean Road on the south to Gibbs Road on the north. This vacant land, although separated from both residences, is apparently very conducive to amenity. It lies between the houses and the sea, and is, as the learned Trial Judge explains, in a situation which is of the coolest and most highly prized in Bombay for residential purposes.

No doubt has ever been cast upon the respondent's title to any part of the property as just described, but considerable difficulties in relation to it as a subject of sale arose by reason of the different tenures on which it is held. The greater portion is perpetually renewable leasehold, and as to this there is no trouble. But a very substantial part of the whole, including in it a considerable slice of the house "Il Palazzo" itself and a large part of its immediate compound, is held from Government upon a precarious tenure known as sanadi determinable at any time, if the land be required, for public purposes. There is along a part of the boundary, but not over its whole length, a line of physical demarcation between the leasehold and sanadi lands. But it seems to be the fact that until the actual line was ascertained by her nephew, Solomon Judah, and marked on a plan sent by him to the respondent on the 27th December, 1918, the actual boundaries were quite unknown to her.

For some time the respondent had ceased to be permanently resident in Bombay and Nepean House was all that she needed for her own use. She desired to dispose of "Il Palazzo," which had become too large for her requirements. The partition of the two properties, however, on a sale of "Il Palazzo" was apart from any difficulties of tenure by no means a simple matter, if, while preserving the amenity and convenience as a residence of Nepean House, the attractiveness of "Il Palazzo" as a subject of separate sale was to be maintained. It is quite clear that upon the question of the dividing line to be fixed between the two properties on partition, the respondent had in her own mind a very definite objective, which was that while the vacant land to the west directly in front of the curtilage of "Il Palazzo" might be sold with that house, the vacant land also to the west

P. C.
Ardeshir H. Mama v. Flora Sassoon.
Lord Blanesburgh.

directly in front of the curtilage of Nepean House must be retained for enjoyment therewith.

The contract in suit does not fully respect that desire of the respondent and the main point to be determined upon the issue whether the defendant is, in any circumstances, bound by its terms, will be whether her agent is shown to have had any authority to bind her to a sale of hereditaments which include some of the last-mentioned land.

As that agent, Solomon Judah, himself at one stage of the correspondence, and, as counsel for the appellant before the Board, vouched his authority on this point by reference to a memorandum by the respondent, dated from London on the 19th of June, 1917, it is convenient here to set forth its terms so far as they are material. These are as follows:—

"32, Bruton Street,
"London, W.1.
"June 19, 1917.

"*Re* 'Palazzo' and Vacant Land on Malabar Hill, Bombay.

"*Area.*—The area of the land on Malabar Hill on which the large building 'Palazzo' stands, and also the vacant land in front of it so far as the 'Nizam's property' is about 30,000 (thirty thousand) square yards.

"*Tenure.*—Nearly all the land is leasehold for 99 years, renewable in perpetuity on exactly the same terms.

"*Price of Land.*—Price Rs 20 (Rupees twenty) for the land on the Ridge Road and Little Gibbs Road, and for down below Rs. 12 (Rupees twelve) per square yard, both net prices.

"*Price of 'Palazzo.'*—My price for the house 'Palazzo,' the stables, coach house, etc., is Rs. 5,00,000 (Rupees Five lacs) net, exclusive of the land on which these buildings stand.

"The house 'Palazzo' is at present let to Government, and the agreement will expire on the 30th of September, 1918. Should the house be sold, six months' notice can be given to Government.

"To Mrs. I.E. Judah,
"Lansdown House,
"Apollo Bunder, Bombay."

Now with reference to this document there are some things which it is convenient at once to say. First of all there is no evidence at all as to the circumstances in which or the purpose for which it was sent by the respondent to Mrs. Judah. That Solomon Judah, her son, knew of its existence and was familiar with its terms is not now questioned, but whether he either did or could have relied upon it as expressing, two years and a half later, the respondent's views for any purpose whatever is, in the circumstances, a very different question to which their Lordships must return. Next, reading the document, as one in which the respondent is describing a property she desires to sell if she

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

can, the vagueness of its terms, especially when the existence and situation of Nepean House and its surroundings are borne in mind, becomes at once apparent

> "The land on which 'Il Palazzo' stands."
> "The vacant land in front of it so far as the Nizam's property."
> "Nearly all leasehold."
> "About 30,000 square yards."

And this vagueness was the quality which, apparently throughout, struck those who read the memorandum. One nephew, who busied himself in an attempt to secure a purchaser, regarded it as too indefinite for any useful purpose. Solomon Judah's own views of it will be found stated in correspondence of his to which reference must later be made. It is, however, the one description under the respondent's hand of the property for sale to which the appellant can refer, and if it be a document then operative at all he has under that description, vague as it is, to find an authority to sell an area which extended to as much as 31,714 square yards, and which included not only vacant land "in front of" "Il Palazzo," but vacant land as well, in front in a similar sense of Nepean House.

The introduction to the business of the respondent's nephew, Solomon Judah, is nowhere explained. It seems probable that being a solicitor and knowing from his mother of his aunt's, the respondent's, desire to sell "Il Palazzo" should a satisfactory price be obtainable he, in the hope of earning a commission, but without any direct instructions or authority from the respondent, busied himself in efforts to find a purchaser.

It was in a letter to Solomon Judah that, on the 4th December, 1918, the appellant made his first offer for the property.

This was an offer of nine lacs for

> "Mrs. Sassoon's property at Malabar Hill known as 'Il Palazzo' (area 30,000 square yards or thereabouts), Mrs. Sassoon to make out a marketable title. Costs of agreement and of completing sale to be borne half and half by vendor and purchaser. If this offer is accepted I shall deposit Rs. 50,000 as earnest money immediately on receipt of intimation of acceptance by the vendor to pay brokerage at 2 per cent. on purchase money. Sale to be completed within six months of acceptance of offer."

Their Lordships draw attention here to the appellant's then stipulation as to the date of completion—an important point in relation to the alleged contract in suit as will later appear.

This offer was on the same day cabled by Solomon Judah to the respondent. Their Lordships hope that the statement as to brokerage both in Judah's cable and accompanying letter was

P. C.
Ardeshir H. Mama v. Flora Sassoon.
Lord Blanesburgh.

merely a mistake. If not so, it is very significant of his attitude in the matter. The cable is so far as material as follows:—

"Firm offer 'Il Palazzo' nine lacs brokerage 2¼ per cent. half costs completion six months, deposit half lacs."

In his letter of even date, Judah says:

"If this offer is accepted the buyer will pay Rs. 50,000 as earnest money and complete the sale within six months from the acceptance of the offer. Brokerage at the rate of 2¼ per cent. will be payable by you and also half the costs of completing the sale.

"We are now waiting for your reply."

The respondent did not wait for that letter. Her cabled reply on the 16th December to the cable of the 5th was curt enough: "Unaccepted." This cable Solomon answered by a letter of the 27th December, which is important as showing the unfavourable influence of the sanadi land upon any proposed sale, and also his own ignorance, notwithstanding the memorandum, of the respondent's real wishes as to the property to be sold.

"Before the receipt of your cable," he says, "I got Neaman Babaji to prepare a plan of the land. From this plan it appears (assuming the plan is correct) that the southern end of the main building stands on sanad land which is resumable by Government for a public purpose. The area of sanad land included in the compound of 'Il Palazzo' is about 2,200 square yards. Assuming this to be correct the situation is wholly changed and, as a matter of fact, the buyer's agent when he saw the plan said the offer was withdrawn."

Then after dealing with the prospects of sale elsewhere the letter proceeds:—

"You will see from the above that a lot of things will have to be arranged and I will have to devote a great deal of my time before a sale of any can be effected.

"I am very much handicapped in the absence of the necessary information and I feel as if I am groping in the dark. Can you send the title deeds to Bombay? If I can get any further offer in the meantime I shall meet you.

"Must also say that if any sale is effected you will be good enough to pay me Rs. 5,000 for my troubles exclusive of professional costs as usual as I cannot get anything from the other side."

Their Lordships pause here to observe that there is nothing in the evidence to show that Solomon Judah at the date of the alleged contract in suit was any better informed as to the respondent's wishes than he expressed himself to be at the date of that letter, which on this subject is in violent contrast with the statements in his letter of the 27th of February, 1926, to which attention will be called in its order of date.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

The next offer sent on by Solomon Judah was also from the appellant. It is contained in a cable of the 21st April, 1919, in the following terms:—

"Firm offer 'Il Palazzo' Eleven lacs Fifty thousand nett. Subject to Tenure of whole land being Permanent Leasehold and Southern Boundary being line drawn through Back Wall of Hackham Schuas Quarters from Ridge to Nepean Road. Letter enclosing sketch follows. Telegraph acceptance."

It is difficult to understand how an offer making such stipulations as to title was, with his then knowledge, even forwarded by Judah. This is one of the many matters on which no information has been vouchsafed. The respondent, however, without waiting for the letter or the plan at once rejected the offer. "Unable accept" she cabled on the 24th April. The plan which was subsequently received and returned by her to Solomon Judah becomes very important at the next stage.

This was a cable of the 11th December, which substituting the word "practicable" for the word "unpracticable" apparently, in the appendix, a misprint, reads as follows:—

"Your letter stating your price 'Palazzo' received." [This letter is not produced.] "Consider practicable provided willing give southern boundary as in the plan you returned, will exert on receiving your telegram making firm offer, your final price to be accepted within eight days from receipt here must pay brokerage half costs"

The southern boundary marked in the plan referred to was a boundary which crossed diagonally that which might fairly perhaps be regarded as the compound of Nepean House to the junction between the Nepean Road and the wall, already referred to as separating the curtilage of the two houses from the vacant land to the west. That southern boundary accordingly also took away from Nepean House every part of that vacant land.

To this cable, the respondent's reply of the 19th December is of first importance. It was as follows: "Southern Boundary not acceptable. Price eighteen lacs clear."

Now it seems to their Lordships reasonably plain that the meaning of that cable is that for "Il Palazzo" sold with a southern boundary that was acceptable to her the respondent would be willing to accept eighteen lacs clear—that is free of costs or brokerage—but the cable gave no authority whatever to Solomon Judah on her behalf to fix that boundary if it had not already been fixed by herself.

What view Solomon Judah took of the cable we may not know, for, as later to be stated, he did not appear in the witness

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

box. What he did was to go Karachi with the appellant's attorney and there, purporting to act on the respondent's behalf but without further communication with her, to enter into a transaction in the terms of a receipt dated the 20th December, 1919, which their Lordships here transcribe at length:—

"Received from Mr. Ardeshir H Mama of Karachi a cheque bearing No. B005564, dated 29th December 1919 on the Central Bank of India, Ltd., Bombay, favouring Mrs. Flora Sassoon for payment into her account in the Chartered Bank of India, Australia and China, Ltd., Rs. 1,00,000 (Rupees One lac) only as earnest money towards and in part payment of Rs. 18,00,000 (Rupees Eighteen lacs) net free of all costs and brokerage, being the sum or price at which the said Mr. Ardeshir H. Mama of Karachi has accepted her firm offer made through me *vide* telegrams exchanged between me and her, viz., my telegram dated, Bombay, 11th December, 1919, her wire dated, London, 19th December 1919, received in Bombay on the 24th December 1919 (and my telegram dated Karachi, 29th December 1919), for the sale of her property known as 'Il Palazzo.' and the land appurtenant thereto situated on the Ridge, Malabar Hill, Bombay, bearing Survey Nos. 1|7165, 5|7165 and 6|7165 admeasuring about 31,714 square yards of Government leasehold land and about 2,000 to 3,000 square yards of sanad land being portion of Survey No. 7176 as per copy plan attached and shown therein by boundary line coloured red.

"It is agreed that a further sum of Rupees 2,00,000 (Two lacs) will be paid in part payment within three months from this date and the balance of Rupees 15,00,000 (Rupees Fifteen lacs) within one year from date upon the completion of the conveyance of the property.

"Dated Karachi this 29th day of December 1919.

"SOLOMON JUDAH.

"29—12—19."

Now the outstanding points with regard to that receipt are these. First, the southern boundary of the lands sold, as there described, follow, except in one particular, an existing wall dividing the vacant land to the north from the vacant land to the south. In one respect even, as so described, the division goes more against Nepean House than it need have done. For a boundary wall to the south is at one point taken as the boundary instead of a second wall further to the north. The result is to cut off from Nepean House a portion of the vacant land "in front,"—land with an access to Nepean Road which would have been reserved if only the land strictly "in front" of "Il Palazzo" had been included in the sale. What however is perhaps a more general criticism upon the parcels is that they are fixed upon a basis which so far as the evidence goes had not before been suggested by anyone and it is only accidental if they chance to square with any previous suggestion or instruction. The next point to be observed is this. The receipt is careful to express the source of Solomon

Judah's authority. It is, as stated, to be found in the cables already set forth of the 11th December and the 19th of December. There is no reference it will be noted to the memorandum of the 19th of June, 1917, although that memorandum was subsequently alleged to be the basis of the whole. The third point to be noted is, that just as in his offer of the 4th December, 1918, the appellant stipulates for a fixed date for completion, so in the receipt now the stipulation being expressed as an agreement, very exceptional provisions for payment of the purchase price and as to the date of completion are inserted, and by these Solomon Judah, as he himself has agreed, had no authority to bind the respondent.

Proceeding now with the narrative, Solomon Judah on the same day cabled the respondent as follows:—

"Your telegram received 24th. Your terms and price Eighteen Lacs accepted to-day by Ardeshir Mama of Karachi. Earnest money One Lac received. Paying Chartered Bank Letter follows."

The respondent on the 6th January replied:—

"Your wire of the 29th December 1919 came to hand. . . . I am very much obliged for all your trouble and as soon as I receive your letter I will communicate with you further on this subject."

Solomon Judah's promised letter was sent on the 31st December and it contains the following passage:—

"Enclosed is a copy of the receipt passed by me for the earnest money and of the plan. Mr. Mama proposes to pay a further sum of Rupees two lacs within three months and the full balance within twelve months. Informed him that I had no authority or instruction on this point and that six months would be a reasonable period for completion. He however asks you to agree to the period of 12 months as the amount is very large and no one can be expected to keep such a large amount free. The boundary of the land sold with 'Il Palazzo' has been shown by a red line . . . . total 31,714 square yards, the area of the sanad land is taken roughly at between two and three thousand square yards. . . .

"I have to congratulate you on the completion of this sale and I assure you that you have received a very good price, the extra piece of land on the southern boundary was a great stumbling block and as far as Bombay buyers were concerned they absolutely declined to go in for the property at all without the extra land on the south side. Mr. Mama also wanted the extra land, but as you have definitely refused to give the same he has accepted your terms."

To this letter the respondent's reply was by cable on the 26th January as follows:—

"Yours Thirty-first December. Boundary incorrect. Payment arrangements unacceptable."

On the 1st February Solomon Judah replied:—

"Send corrected plan. Payment no difficulty"

P. C.
Ardeshir H. Mama v. Flora Sassoon.
Lord Blanesburgh.

to which on the 5th February the defendant sent her final personal letter:—

"Your telegram of 1st inst. . . . reached me this afternoon and needs no answer as you will hear everything from Messrs. Wadia, Ghandy and Company."

There is only one further letter to which their Lordships in this connection need refer.

On the 27th February, 1920, Solomon Judah anxious to induce the respondent to homologate his contract wrote:—

"I also enclose copy of your memorandum dated 25th June, 1917, which you sent us giving particulars of the property you desired to sell. I showed this memorandum to Mr. Mama at Karachi and he accepted your terms as mentioned in that memorandum. On the basis of that memorandum I drew the red boundary line on the plan I sent you."

Now these are the materials by which the Courts have been asked to determine whether there ever existed a contract binding upon the respondent.

The events which immediately followed the respondent's cable of the 19th December, 1919, were that she received from Mr. Dubash, whose name has already been mentioned, an offer to purchase "Il Palazzo" for Rs. 25 lacs, and on the advice of her solicitors whose view after all the facts were known to them was that the alleged contract with the appellant was not binding upon her, the respondent entered into a contract to sell the property to Mr. Dubash at that high price, the purchase to be completed if the appellant either abandoned or failed to enforce his contract. It is fair to the respondent to say that she hesitated to risk this definite step, and thus put herself in the position of having to escape from the contract alleged by the appellant, if she could. However, on advice, she took it, and her attitude at once alienated Solomon Judah, who at the outset became solicitor for the appellant to enforce his contract, but ended apparently by being estranged from both parties.

One further result was that no effective evidence was called on either side. The appellant did not go into the box. It would have been useful to hear from him whether he at Karachi either heard of or saw the memorandum of June, 1917, which is not mentioned in the receipt. He might also have explained how that memorandum so useless at an earlier stage even to Solomon Judah had then become so clear to them both. Nor did the respondent give evidence although every relevant fact was within her knowledge. And neither side ventured to call Solomon Judah. In the result, both appellant and respondent united in

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

leaving the Court to determine their dispute on the barest economy of material, each of them for interested reasons withholding useful information which they were well in a position to supply. If the final decision bears hardly on the unsuccessful party, the blame does not rest with the Courts.

On the materials provided and on them alone their Lordships must now determine this question of authority. They begin by observing that the burden of proving that the contract sued on is binding upon the respondent rests with the appellant. And the Board, in agreement with the Appellate Court, are of opinion that that burden has not been discharged. The appellant has not proved that the terms of the alleged contract so far as parcels are concerned were ever authorised by the respondent. No such authority is or can be found in the telegrams mentioned in the receipt. In view of all that had happened since the memorandum of the 19th of June, 1917, was written, and in view of Solomon Judah's statement in his letter of the 27th December, 1918, that in the absence of necessary information he was groping in the dark, in view of the intimation thereby implied that the memorandum was of little use to him and in view further of the absence of any reference to it in the receipt their Lordships cannot accept as otherwise than a desperate attempt on Solomon Judah's part to find authority for what he had done, the statement as to this memorandum made in his letter of the 27th February, 1920, already quoted. In the absence of evidence in support of it their Lordships must treat that statement as extravagant and quite unreliable. But, further, even if authority can properly be looked for in the memorandum of 1917, their Lordships are of opinion that there is contained in it no description of the property which could justify the southern boundary as fixed by the receipt of the 29th December, 1919.

The real conclusion, however, to which their Lordships are led by a careful consideration of the documents placed before them is that Solomon Judah in signing that receipt on behalf of the respondent never stopped to consider whether he had authority to bind her by the parcels on which the appellant insisted. Judah obtained from the appellant the price which the respondent required: he arranged with him a boundary line not inconvenient and he was content to run the risk, which probably he did not regard as serious, of the respondent with her other conditions satisfied seriously objecting to the parcels. But the

P. C.
Ardeshir H. Mama v. Flora Sassoon.
Lord Blanesburgh.

respondent being entitled, if it was to her interest, to reject the boundary arranged, she chose to reject it. The result is, that the so-called agreement of the 29th December, 1919, is not binding upon her.

But there is in their Lordships' judgment perhaps even a more certain road by which the same conclusion may be reached.

The appellant does not seek to controvert Solomon Judah's statement in his letter of the 17th March, 1920, to the effect that the paragraph of the receipt as to payment of the price and completion was therein inserted by him without authority. In point of law therefore, for their Lordships cannot read its last paragraph as other than an integral part of the document, the receipt taken as a whole was never more than a counter-offer by the appellant, which not having been accepted by the respondent did not mature into a contract. The receipt was merely a step in a negotiation never concluded. On this ground also, their Lordships reach the same conclusion as the Appellate Tribunal.

And but for the special circumstances set forth at the commencement of this judgment, their Lordships would be content to leave the case there.

But they go on for the reasons already given to consider the very important question of practice discussed by the learned Chief Justice in his judgment.

If there had been a contract binding upon the respondent would it have been permissible in the circumstances to restore the learned Judge's award of damages against her?

The answer to this question depends upon the true construction and effect of the Specific Relief Act, 1877, and, in particular, of its Part II, Ch. II, which deals with the Specific Performance of Contracts. The Act, like the Indian Contract Act, 1872, is a code. The chapter in question is a codification, with modifications deemed to be called for by Indian conditions and procedure of the then existing Rules and Practice of the English Law in relation to the doctrine of specific performance. In the present case, it will aid the interpretation of the relevant sections to have in mind what the English system on which the Act is based was in its origin and in its fullness at the date of codification. Even a summary account of that system—necessarily incomplete and quite elementary, will serve, as their Lordships believe, to throw a light upon certain provisions of the Specific Relief Act, from lack of which a full appreciation of their meaning has not consistently been manifested.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

According to the common law of England, the only legal right which arose upon the non-performance of a contract in favour of the party injured by its breach was a claim for damages. The inadequacy in many cases of that remedy for the purposes of justice supplied the incentive to a Court of Conscience, as the Chancellor's Court has been called, to decree, when applied to in particular cases, the more complete remedy of specific performance. As a result of a long course of decisions by Chancellors and other equity Judges, there was gradually evolved in England a body of settled principles and rules governing the exercise of that jurisdiction, so that in course of time its limits were settled almost as definitely as if they had been embodied in a statute. By 1877, and in most respects long before, this stage had been reached. It need hardly be recalled that amongst the contracts to which an order for specific performance was always regarded as peculiarly appropriate were contracts relating to land or an interest therein, such, for instance, as the contract alleged in the present case. It is, however, interesting to note that this appropriateness is re-affirmed in S. 12 of the Indian Act, so closely does it follow the parent system.

All this is, historically, the explanation of the fact, that in relation to a contract to which the equitable form of relief was applicable, a party thereto had two remedies open to him in the event of the other party refusing or omitting to perform his part of the bargain. He might either institute a suit in equity for specific performance, or he might bring an action at law for the breach. But—and this is the basic fact to be remembered throughout the present discussion—his attitude towards the contract and towards the defendant differed fundamentally according to his choice.

Where the injured party sued at law for a breach, going, as in the present case, to the root of the contract, he thereby elected to treat the contract as at an end and himself as discharged from its obligations. No further performance by him was either contemplated or had to be tendered.

In a suit for specific performance on the other hand, he treated and was required by the Court to treat the contract as still subsisting. He had in that suit to allege, and if the fact was traversed, he was required to prove a continuous readiness and willingness, from the date of the contract to the time of the hearing, to perform the contract on his part. Failure to

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

make good that averment brought with it the inevitable dismissal of his suit. Thus it was that the commencement of an action for damages being, on the principle of such cases as *Clough* v. *L. & N. W. R.*[17] and *Law v. Law*[18] a definite election to treat the contract as at an end, no suit for specific performance, whatever happened to the action, could thereafter be maintained by the aggrieved plaintiff. He had by his election precluded himself even from making the averment just referred to proof of which was essential to the success of his suit. The effect upon an action for damages for breach of a previous suit for specific performance will be apparent after the question of the competence of the Court itself to award damages in such a suit has been touched upon.

Whether or not the Court of Chancery ever assumed jurisdiction in the matter it was not in accordance with its practice to award damages for breach of contract. That was, as Lord Eldon said, "purely at law." But experience showed that cases from time to time occurred in which, although the contract was one of which specific performance might, quite consistently with principle be decreed, damages were the more adequate remedy, and it became obviously expedient that in such a case the Court should not be compelled to send the plaintiff to law, but should be permitted itself to dispose of the case.

Accordingly, in 1858, Lord Cairns' Act was passed. It is convenient to cite its second section, for it is important to note the correspondence of the words of that section as judicially interpreted with the provisions of section 19 of the Specific Relief Act upon which so much now turns. The words, so far as here relevant, are these:

"In all cases in which the Court of Chancery has jurisdiction to entertain an application for . . . . the specific performance of any covenant, contract or agreement, it shall be lawful for the same Court, if it shall think fit, to award damages to the party injured, either in addition to or in substitution for such . . . specific performance, and such damages may be assessed as the Court shall direct."

The limited effect of the section was not long left in doubt, wide as are apparently its terms. In a series of decisions it was consistently held that just as its power to give damages *additional* was to be exercised in a suit in which the Court *had* granted specific performance, so the power to give damages as an *alternative* to specific performance did not extend to a case in which the plaintiff had debarred himself from claiming that form of

17. (1871) L.R. 7 Exch. 26. 18. (1905) 1 Ch. 140.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

relief, nor to a case in which that relief had become impossible. In the present instance, their Lordships are disposing of a case in which the plaintiff had debarred himself from asking at the hearing for specific performance, and in such circumstances, notwithstanding Lord Cairns' Act, the result still was that with no award of damages—the Court could award none—the order would be one dismissing the suit with no reservation of any liberty to proceed at law for damages. *See* per Lord Selborne, *Hipgrave* v. *Case*.[3] In other words, the plaintiff's rights in respect of the contract were at an end.

From all of which it appears that in England in a suit like the present, after the appellant had written his letter of the 19th March, 1924, if that letter is to be interpreted as their Lordships think it should be, he could neither have obtained a decree in the suit nor damages anywhere else.

The change in this matter effected in England by the Judicature Act was one in procedure only. It enabled every Division of the High Court to give both legal and equitable remedies, but it did not alter the construction or effect of a claim framed under Lord Cairns' Act—see *Hipgrave* v. *Case*,[3] nor the principles upon which the systems now combined were before the Act, separately administered. Accordingly, an order dismissing an action for specific performance which before the Act would have been unqualified, remained after the Act a decree which excluded the possibility of legal relief. And here their Lordships would draw attention for convenience sake, to the definiteness with which that position is retained for India by section 29 of the Specific Relief Act.

Bearing in mind this statement of the existing operation of the English system at the time of the passing of the Specific Relief Act, their Lordships now proceed to an examination of the relevant provisions of that Statute.

And, first, very notable is the fact that in the Act, the distinction between the two kinds of action is maintained, a distinction obvious in England where originally they had to be brought in different Courts, but not so necessarily called for, when, as in India, both legal and equitable relief may be obtained in one. The distinction, however, is clearly indicated in section 24 (*c*), which enacts that specific performance of a contract cannot be enforced in favour of a person "who has already chosen his remedy and obtained satisfaction for the alleged

3. (1885) 28 Ch.D. 356, 361, 362.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

breach of contract": and even more directly is it manifested in section 29 already referred to which enacts that the dismissal of a suit for specific performance of a contract . . . . "shall bar the plaintiff's right to sue for compensation for the breach of such contract."

Although so far as the Act is concerned, there is no express statement that the averment of readiness and willingness is in an Indian suit for specific performance as necessary as it always was in England (section 24 (*b*) is the nearest), it seems invariably to have been recognised, and, on principle, their Lordships think rightly, that the Indian and the English requirements in this matter are the same. See, *e g.*, *Karsandas* v. *Chhotalal.*[2] And, with this fact in view, section 19 of the Act becomes in the present investigation all important. The section is as follows:

"Any person suing for the specific performance of a contract may also ask for compensation for its breach, either in addition to or in substitution for such performance.

If in any such suit the Court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly. If in any such suit the Court decides that specific performance ought to be granted, but that it is not sufficient to satisfy the justice of the case, and that some compensation for breach of the contract should also be made to the plaintiff, it shall award him such compensation accordingly.

Compensation awarded under this section may be assessed in such manner as the Court may direct.

EXPLANATION—The circumstance that the contract has become incapable of specific performance does not preclude the Court from exercising the jurisdiction conferred by this section."

Now the close correspondence of the terms of this section with those of section 2 of Lord Cairns' Act, coupled with the presence in the Act of section 24 (*c*) and section 29 already noted, indicating that the old distinction in case of breach of contract between the equitable and the legal form of remedy is still maintained and that the old conditions under which each could be asked for are being preserved, lead their Lordships to the conclusion that, except as to the case provided for in the explanation—as to which there is introduced an express divergence from Lord Cairns' Act, as expounded in England —see *Ferguson* v. *Wilson*[12]—the section embodies the same principle as Lord Cairns' Act, and does not any more than did the English Statute enable the Court in a specific performance

2. (1923) 25 Bom. L.R. 1037 at 1050. 12 (1866) L.R. 2 Ch. A. 77.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

suit to award "compensation for its breach" where at the hearing the plaintiff has debarred himself by his own action from asking for a specific decree.

And on looking at the plaint in this suit, their Lordships can have no doubt, any more than the English Court of Appeal had with reference to the Statement of Claim in *Hipgrave* v. *Case*,[3] that it is framed with reference to the 19th section, and that the alternative claim for damages thereby made is in the plaint conditioned just as it is conditioned in the section. It follows that in their Lordships' judgment there was after the letter of 19th March, 1924, no power left in the Trial Judge, without an apt and sufficient amendment of the plaint to award the plaintiff at the hearing any relief at all. And they are further of opinion, that the amendment in the plaint, as actually then made, did not, on its true construction, make any difference in this respect. For that amendment properly construed, did not, as it should have done to be effective, operate to convert the suit into one for the recovery of damages for breach of contract. The retention of paragraph 9 of the original plaint, with its allegation that the plaintiff " is as he has been throughout ready and willing to perform his said contract," coupled with the retention also of the claim for specific performance seems to their Lordships to involve that conclusion. Accordingly, even on the claim, as actually amended, there was, in their view, no power left in the Trial Judge to award damages.

But their Lordships recognise that it was the intention of the appellant, by the amendment which he asked for, to convert his suit into one for damages *simpliciter*. They recognise also, that it was the intention of the learned Trial Judge that the amendment he allowed should actually have that result. Their Lordships, therefore, proceed to inquire whether the learned Judge had at the stage in the suit, when he allowed the amendment, any power to make such an order.

Upon this, their Lordships are of opinion that he had the power. Whether it was one to be exercised in the circumstances is another matter. But that the learned Judge had the power is deducible from this consideration. Section 29 of the Statute, as already shown, makes the dismissal of a suit for specific performance of a contract a bar to a right to sue for compensation for breach. That enactment implies that prior to such dismissal the right is not barred. Here when the amendment

3. (1885) 28 Ch.D. 356.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

was allowed, the suit had not been dismissed, and in their Lordships' view there was thus power in the Judge to allow to be made by amendment of the pending suit, a claim that might have been brought forward in a new suit then commenced.

But their Lordships are of opinion that the intended amendment in the present case—whether rightly allowed or not—was allowed without any proper appreciation of its serious effect upon the position of the parties to the suit. For four years that suit had been pending as a specific performance action: the rights in these circumstances given to the plaintiff by section 27 (*b*) of the Statute had made it impossible for the defendant by unconditional sale to deal with the property in suit. In other words, the plaintiff had, in effect, for four years and without any undertaking in damages on his part, held an effective injunction against the defendant's dealing with that property in derogation of his claim thereto as purchaser. An amendment which deprived the Court of the power to compel him to accept a decree, on pain of having his action dismissed if he did not, was not one lightly to be granted.

In other words, that the Court should have the power of granting such an amendment in a proper case is salutary and indeed necessary. The possibility that the power will be exercised may, in certain cases, be the only effective check upon a defendant to a specific performance suit, who, by delay, expensive appeals and other devices, sets himself to starve a relatively impecunious plaintiff into submission by making continued performance of the contract on his part, beyond his power. And such a power is possessed by the Court in England, and in a proper case and under suitable conditions it may be used, see *Nicholson* v. *Brown*.[19] But it is one to be most carefully and jealously exercised in all the circumstances of each individual case and with due regard to its effect upon the position both of the plaintiff and the defendant. If the defendant is to be prevented by the possible exercise of the power from starving a plaintiff out of his rights, the plaintiff must not by its ill-considered exercise be permitted to turn his suit into a gamble for himself at the defendant's expense. Indeed, so serious in many cases is the exercise of this power that to their Lordships it would appear to be a wise precaution for a Judge before allowing any such amendment in a contested case to require the plaint to be actually remodelled in a form appropriate to an

19. (1897) W.N. 52.

action seeking compensation for breach of contract and nothing else. The extent and propriety of what is asked for will thus be made apparent, and the amendment will be allowed or refused with a due appreciation of the position.

P. C.

Ardeshir H. Mama v. Flora Sassoon.

Lord Blanesburgh.

Their Lordships have said enough to show how difficult would have been the task had it been necessary for them in the present case to pronounce definitely whether or not the award of the learned Trial Judge as to damages could stand either in whole or in part. Further serious questions as to the measure of damage chosen by him—to which they have not alluded—would have also been involved.

It is, however, unnecessary for them to go further than they have done in the discussion of the question for the reason that they have discussed it on principle and the propriety of the order of the learned Judge no longer effectively arises by reason of the conclusion reached by their Lordships on the other part of the case.

Returning accordingly to the opinion expressed by them as to the non-existence of any contract between the parties, their Lordships, for the reasons given in support of that opinion, will humbly advise His Majesty that this appeal should be dismissed and with costs.

Solicitors for appellant: *Ranken Ford & Chester.*

Solicitors for respondent: *Sanderson Lee & Co.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of Oudh.]

PRESENT:—VISCOUNT SUMNER, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Kunwar Jang Bahadur .. *Appellant** (*Judgment-debtor*)

v.

The Bank of Upper India, Ltd., Lucknow, in liquidation .. *Respondents* (*Decree-holders*).

P. C.

Kunwar Jang Bahadur v The Bank of Upper India, Ltd., Lucknow.

Civil Procedure Code (V of 1908), Ss 39, 41 and 50—Transfer of decree for execution—Effect—Jurisdiction of Court which passed decree and of Court of transfer—Death of judgment-debtor after execution started in latter Court —Order of latter Court bringing his legal representative on record—Irregularity or illegality—Submission by legal representative to order—Right to dispute its legality afterwards—Effect on.

---

*P.C. Appeal No. 34 of 1927. 29th March, 1928.

P. C.

Kunwar Jang Bahadur v. The Bank of Upper India, Ltd., Lucknow.

When a decree, directing the sale of immoveable property, is, under cl. (c) of S. 39 of Civil Procedure Code, transferred to another Court for execution, the Court which passed the decree does not altogether lose seisin of the decree. But the Court of transfer obtains jurisdiction to deal with that particular execution proceeding and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed, or, if it fails to execute the decree, the circumstances attending such failure. If the judgment-debtor dies, before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived; and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings.

A decree absolute for sale on a mortgage passed by Court *L* was, under cl (c) of S. 39 of Civil Procedure Code, transferred to Court *H* for execution. After the decree-holder had in due course started an execution proceeding in Court *H*, the judgment-debtor died and the appellant, his son, was, by an order of Court *H* made after due notice and without objection, brought on the record as the legal representative of his deceased father. During the sale proceedings held in Court *H*, the appellant did not raise any objection to the legality of the order bringing him on the record as legal representative on the ground that it was made in violation of the provisions of S. 50 of Civil Procedure Code. On the other hand, appellant obtained, with the consent of the decree-holder, several postponements of the sale, undertaking not to put forth any objection relating to the proclamation or any other objection. After the proceedings had been pending for 3¼ years, he, for the first time, objected to the legality of the sale proceedings on the ground of the illegality of the order bringing him on the record as legal representative.

Held, that Court *H* had jurisdiction to deal with the matter of the execution transferred to it; that the exercise of such jurisdiction as against the appellant, though irregular in the first instance, had been submitted to for a considerable time by him; and that it would be a gross abuse of procedure to allow him to thereafter object to the exercise of such jurisdiction.

Appeal No. 34 of 1927 from a judgment and decree, dated the 6th January, 1925, of the Court of the Judicial Commissioner of Oudh (Dalal and Wazir Hasan, JJ.), which affirmed an order, dated the 22nd April 1924, of the Subordinate Judge of Hardoi.

De Gruyther, K.C. and *Dube* for appellant.

Lowndes, K.C. and *Wallach* for respondents.

P. C.

Kunwar Jang Bahadur v. The Bank of Upper India, Ltd., Lucknow.

29th March, 1928. The judgment in this appeal was prepared by Lord Sinha shortly before his death and read by Sir Lancelot Sanderson.

LORD SINHA.—This is an appeal from an order of the Court of the Judicial Commissioner of Oudh, which confirmed an order of the Subordinate Judge of Hardoi, dismissing the appellant's application that the proceedings in execution of the respondents' decree against him should be discontinued.

The facts are simple. The respondents obtained a decree absolute for sale on a mortgage against Raja Durga Prasad (since deceased), the father of the appellant, in the Court of the Subordinate Judge of Lucknow. As the property which the decree-holder sought to sell under that decree was situate in the district of Hardoi, the Subordinate Judge of Lucknow, who passed the decree, sent it for execution to the Court of the Subordinate Judge of Hardoi under section 39 of the Code of Civil Procedure, 1908, and the respondents in due course started an execution proceeding No. 175 of 1916 in the Hardoi Court.

The judgment-debtor then died on the 23rd April, 1920. On the 25th May following the respondents filed a petition in the Hardoi Court, stating therein the fact of the death of Raja Durga Prasad, and praying that in the place of Raja Durga Prasad (deceased) the name of his eldest son, Kunwar Jang Bahadur, be brought on the record as his representative, and that execution proceedings be taken against the said representative. The Subordinate Judge of Hardoi entertained the application and issued a notice to the appellant. No cause being shown, an order was made on the 4th August, 1920, substituting the appellant in the place of his deceased father upon the record of the execution proceeding.

On the 10th August, 1920, the Subordinate Judge of Hardoi made the following order:—

"In this case, Kunwar Jang Bahadur's name having been substituted for that of Raja Durga Prasad, the deceased judgment-debtor, an amendment be made in the execution application and the Register, and papers be sent to the Court of the Sale Officer, Hardoi, for sale proceedings."

During the sale proceedings the appellant made various objections from time to time both in the Court of the Subordinate Judge and of the Sale Officer (the Collector of the District). Amongst others, on the 21st February, 1921, he obtained a postponement of the sale for two months on the allegation that he wanted to effect a private sale of the property, and promised

P. C.

Kunwar Jang Bahadur v. The Bank of Upper India, Ltd., Lucknow.

through his pleader not to put forth any objections relating to the proclamation or any other objection on the next date. The sale was postponed as the decree-holder's pleader accepted the terms offered.

A postponement on similar terms was also obtained on the 20th January, 1923.

After the proceedings had been pending for 3½ years, the appellant for the first time put in a petition before the Sale Officer on the 10th April, 1924, that the sale proceedings were illegal and without jurisdiction, inasmuch as the decree-holder did not get the name of the appellant entered in the decree of the Court executing the same, in accordance with the provisions of section 50 of the Code of Civil Procedure. The Sale Officer referred the matter to the Civil Court, *i.e.*, the Subordinate Judge of the Court of Hardoi, where the same petition was repeated.

On the 22nd April, 1924, the Subordinate Judge rejected the application for further postponement of the sale and to discontinue the execution proceeding.

Against that order there was an appeal to the Court of the Judicial Commissioner, which confirmed the order of the Subordinate Judge, and the present appeal is against the last order.

It is argued that, though the execution proceeding was pending before the Hardoi Court, when the judgment-debtor Raja Durga Prasad died, the application to substitute the appellant in his place as his representative could only be made to the Lucknow Court which passed the decree, and that the Hardoi Court had no jurisdiction to make that order.

Obviously, there are no merits in this appeal. It was not suggested at any stage that the appellant was not the legal representative of the deceased judgment-debtor nor was it denied that by the various applications he made to the Hardoi Court he had acquiesced in its jurisdiction until the last moment when the property was being actually put up for sale.

But it is argued that the order of the 4th August, 1920, substituting the appellant in place of his father was a nullity and that all proceedings subsequent thereto in the Hardoi Court were *coram non judice* and as such void.

Section 50 of the Code of Civil Procedure, 1908, is relied upon in support of the argument that the Lucknow Court alone was competent to make the order for substitution.

P. C.

Kunwar Jang Bahadur v. The Bank of Upper India, Ltd., Lucknow.

There is an apparent divergence of opinion among the different High Courts in India on this question. It has been held by the High Courts of Bombay, Allahabad and Madras that the application for execution in such a case should be made to the Court which passed the decree, and that the Court to which the decree is sent for execution is not competent to entertain the application and make an order of execution against the legal representative. On the other hand it has been held by the High Court of Calcutta that an application for substitution if made in such a case to the Court to which the decree is sent for execution, is nothing more than an irregularity which would be cured by the provisions of section 578 of the Code of 1882.

The question turns upon the construction of section 50 of the Code of Civil Procedure of 1908, cl. (1), which is as follows:—

"Where a judgment-debtor dies before the decree has been fully satisfied the holder of the decree may apply to the Court which passed it to execute the same against the legal representative of the deceased"

Now, the words "which passed it" were not in the corresponding section (*viz.*, S. 210) of the Code of Civil Procedure, 1859, but were inserted in section 234 of the Code of 1877 and have been since continued in section 234 of the Code of 1882 and section 50 of the Code of 1908.

The question is, was the effect of the introduction of those words to confer an exclusive jurisdiction on the Court which passed the decree in the matter of substitution or merely to lay down a rule of procedure as to which of the two Courts an application for substitution should be made?

In order to decide that question, it is necessary to examine the provisions of the Code as to execution when a decree is transferred. Under clause (*c*) of section 39 of the Code of 1908, a decree, directing the sale of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, may be transferred for purposes of execution to the Court within whose jurisdiction the property is situated. On such transfer the former Court does not altogether lose seisin of the decree. But the Court of transfer obtains jurisdiction to deal with that particular execution proceeding and retains such jurisdiction until such execution is withdrawn or stayed or until it certifies to the Court which passed the decree either that the decree has been executed or if it fails to execute the decree, the circumstances attending such failure (S. 41).

P. C.

Kunwar Jang Bahadur v. The Bank of Upper India, Ltd., Lucknow.

If the judgment-debtor dies before any such certificate is issued, the Court of transfer does not lose its jurisdiction over the execution proceeding, which does not abate by reason of the death. But before execution can proceed against the legal representative of the deceased judgment-debtor, the decree-holder must get an order for substitution from the Court which passed the decree. This is a matter of procedure and not of jurisdiction. The jurisdiction over the subject-matter continues as before, but a certain procedure is prescribed for the exercise of such jurisdiction. If there is non-compliance with such procedure the defect might be waived, and the party who has acquiesced in the Court exercising it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings.

Looked at from this point of view there does not appear to be any real conflict between the different decisions in India. In the case of *Sham Lal Pal* v. *Modhu Sudan Sircar*[1] the application under section 234 of the Code of 1882 (now S. 50) was regarded as mere matter of form, *i.e.*, of procedure, as explained by Banerjee, J., in *Amar Chundra Banerjee* v. *Guru Prosunno Mukerjee*.[2] Similarly in the case of *Swaminatha Aiyar* v. *Vaidyanatha Sastri*,[3] when the case came on for final hearing, after the decision of the point referred to the Full Bench, Sir Arnold White, C.J., and Subramania Aiyar, J., held that the irregularity involved in the order for substitution having been made by the Court to which the decree had been sent for execution could not be cured by virtue of section 578 of the then Code "as objection was taken by the appellants to the application being entertained by the Court." In other words, there had been no such waiver as would cure a defect in procedure, though no waiver could confer jurisdiction where none existed.

After consideration of all the circumstances of the case under appeal their Lordships come to the conclusion that the Hardoi Court had jurisdiction to deal with the matter of the execution transferred to it; that the exercise of such jurisdiction as against the appellant, though irregular in the first instance, was submitted to for a considerable time by him. He cannot now be heard to object to the exercise of such jurisdiction, and it would be to permit a gross abuse of procedure if he was allowed to do so.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

1. (1895) I.L.R. 22 C. 558. 2. (1900) I.L.R. 27 C. 488, 493.
3. (1905) I.L.R. 28 M 466: 15 M.L.J. 116 (F.B.).

Solicitors for appellant: *Watkins & Hunter.*

Solicitors for respondents: *T. L. Wilson & Co.*

K.J.R. *Appeal dismissed.*

P. C.

Kunwar Jang Bahadur v. The Bank of Upper India, Ltd., Lucknow.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

In Insolvency.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE PAKENHAM WALSH.

Re *The Powers of the newly Enrolled Statutory Advocates under the Indian Bar Councils Act.*

F. B.

Re the Powers of the newly Enrolled Statutory Advocates.

Bar Councils Act of 1926, Ss 8 and 14—Advocates enrolled in Madras High Court under Act—Insolvency Jurisdiction of High Court—Acting in —Right of—S. 3 of Indian Insolvency Act—S 121 of Presidency Towns Insolvency Act—Effect—Rules curtailing that right of Advocates—Validity of—Word "Practise"—Meaning—Statute—Rules under—Framing of—Rights conferred by Statute—Curtailing of, by Rules—Legality of.

Advocates enrolled in the Madras High Court under the provisions of the Indian Bar Councils Act of 1926 are entitled to act, as well as to plead, in the Insolvency Jurisdiction of the High Court.

At the date of the passing of the Bar Councils Act, the High Court had power to frame rules enabling Advocates to act and plead in the Insolvency Jurisdiction though it did not exercise that power. Neither S. 3 of the Indian Insolvency Act nor S. 121 of the Presidency Towns Insolvency Act presented a statutory bar to the High Court framing rules enabling Advocates to act and plead in the Insolvency Jurisdiction.

Ss. 8 and 14 of the Bar Councils Act, which entitle an Advocate as of right to practise in the High Court, entitle an Advocate of the Madras High Court to appear, act and plead in all the jurisdictions of the Madras High Court, and any rules which cut down that right to plead alone would be repugnant to the provisions of Ss. 8 and 14.

The word "practise" ordinarily means appear, act and plead, unless there is anything in the subject or context to limit its meaning

Where a Statute confers rights on a party in general terms and entitles him to perform more than one function, the cutting down of those rights by a rule would make that rule repugnant to the provisions of the Act.

A. Krishnaswami Aiyar on behalf of the Advocates' Association.—Prior to the Indian Bar Councils Act coming into force the different kinds of practitioners in the High Court

---

6th September, 1928.

F. B.

Re the Powers of the newly Enrolled Statutory Advocates.

were Advocates, Vakils and Attorneys. The vakils had the right both to act and plead on the Original Side and the Appellate Side of the Madras High Court and also in Insolvency Appeals. But they were denied the right to plead or act on the Insolvency Original Side.

The Advocates were of three classes: The Barrister Advocates, the M.L. Advocates, and those practitioners, who, being of over ten years' standing, were enrolled as Advocates by the High Court under the Letters Patent Rules, if in the opinion of the High Court they were fit. The Advocates Appeals, whereas on the Original Side, including Insolvency pleaded and acted on the Appellate Side, including Insolvency Jurisdiction, they did not act, but only pleaded.

The Attorneys did not plead but only acted on the Original Side, including Insolvency Jurisdiction, except in proceedings in chambers, in which they both acted and pleaded. On the Appellate Side they both acted and pleaded.

The Indian Bar Councils Act abolished the distinctions as between the various classes of practitioners; and both Advocates and Vakils had to become Advocates if they wished to retain their rights to practise in the High Court. The old Advocates and Vakils are no more. That they were Vakils or Advocates was only a qualification to become Advocates under the Act.

Counsel then discussed the provisions of the Act.

Section 2 (*a*) defines 'Advocate'. Section 8 lays down that none is entitled to practise in the High Court unless his name is entered as an Advocate in the rolls maintained under the Act. The proviso leaves the Attorneys alone. Section 14 gives the Advocate the right to practise in the High Court. The only qualification of the right to practise is that contained in sub-section (4) of section 9. That relates only to the Original Side of the Bombay and Calcutta High Courts, where, unlike in Madras, Vakils had no right to practise, *i.e.*, plead the Original Side including Insolvency as well.

[*Chief Justice*.—That has nothing to do with the point before us.]

Section 14 confers a statutory right on the Advocates to practise in the High Court on every side or branch of it. The only exception is the Original Side of the Bombay and Calcutta High Courts. The new Advocates have, therefore, the necessary right, at any rate, to plead on the Insolvency Original Side.

F. B.

Re the Powers of the newly Enrolled Statutory Advocates.

But I go further and claim the right to act as well. 'Practise' means the same thing over every side of the High Court. No distinction is intended or can be inferred as between the different jurisdictions. The High Court is a single institution; and the Advocates also are a single institution. Insolvency, therefore, is necessarily included in the Original Side where the Advocates can practise, *i.e.*, both plead and act. The very object of the Act was to remove the existing distinctions and to constitute a homogeneous bar. 'Practise' must mean both pleading and acting on every side of the High Court.

Counsel then read cls. (1) and (2) of section 19.

The rules framed under the Letters Patent, so far as they are repugnant to the tenor of the Act, are repealed. Cl. (4) of section 19 is a saving clause. It cannot be contended that by this clause the right of the Advocate who was a vakil has been taken away, especially when the object of the Act was to confer a higher right.

(1) The saving clause does not touch the right to practise, which has already been negatively and positively dealt with by sections 8 and 14. They relate to such matters as fees, language in which Court ought to be addressed, etc.

(2) If the rules, etc., relating to or regulating the right to practise are intended to be embraced by the first portion of this clause, they are inconsistent with a provision made by this Act and are, therefore, inapplicable to the Advocates enrolled under the Act.

Order 39, Rule 6 of the High Court Original Side Rules refers to Advocates, Vakils and Attorneys. Rule 128 of the Insolvency Rules has the same wording as Rule 6 of O. 39; but there is no reference to the vakil in the insolvency rule. Rule 128, being repugnant to the Bar Councils Act, must be deemed to be repealed. As no distinction is intended as among the Advocates, there can be no curtailment of rights and to read a prohibition would be repugnant to sections 8 and 14. The cumulative effect of sections 8, 14 and 19 (2) is to give the Advocates the right to plead and act on every side of the High Court and necessarily Insolvency Original Side also. Section 9, cl. (4) uses the words "practise or plead" with reference to the Bombay and Calcutta High Courts. Counsel then cited *Laurentius Ekka* v. *Dhuki Koeri*[1] as to the meaning of the word 'practice'. Practice was there held to mean both pleading and acting.

1. (1925) I.L.R. 4 Pat. 766.

F. B.
Re the Powers of the newly Enrolled Statutory Advocates.

[*Chief Justice.*—That is a decision before the Act.]

[*Kumaraswami Sastri, J.*—The question is whether R. 128 of the Insolvency Rules is by implication repealed by section 19; if it is repealed, then you have the right to act.]

I submit that practice is a comprehensive term and includes every stage. *Bakhtawar Singh* v. *Sant Lal.*[2]

The provisions of Civil Procedure Code are applicable to the Insolvency Side. Under the Code, Advocates can plead and act and so they have right to all similar rights on the Insolvency Side also. Original jurisdiction is comprehensive and includes Insolvency and it has been so held by the Privy Council. *In the matter of Candas Narrondas.*[3]

F. S. Vas for the Bar Association associated himself with the arguments of Mr. Krishnaswami Aiyar and said:

Pleader is defined under the Original Side Rules to include a Vakil and an Attorney. If the rules applicable to pleaders—as including Attorneys—were to be applicable to Advocates under section 19 (4), the new Advocate can both plead and act.

The Advocate under the Act has the rights of the old Advocate, Vakil and Attorney; and so we can both plead and act on the Insolvency Original Side.

V. V. Srinivasa Aiyangar for the Attorneys' Association.—On the date of the coming into force of the Act, the Advocates had no right to act on the Insolvency Side. All that the Act did was to place the vakils on the same footing as the old Advocates. The new Advocates cannot, therefore, claim greater rights under the Act. Section 121 of the Presidency Towns Insolvency Act of 1909 vested in the High Court the Insolvency Jurisdiction which was formerly exercised by a separate Court, *i.e.*, by a Judge of the High Court who was called Commissioner in Insolvency. That was governed by section 3 of the Insolvent-debtors' Act of 1848, Statute 11 and 12 Vict. The Bar Councils Act does not enlarge the rights of the Advocates in any way. The rights are as enacted by section 121 of the Insolvency Act, 1909.

[*Chief Justice.*—Section 121 does not enact anything.]

None but attorneys can act on the Insolvency Side. Counsel then cited *Krishnaswami Aiyar* v. *Swaminatha Aiyar.*[4] The Legislature has enacted by section 3 of 11 and 12 Vict. and

2. (1887) I.L.R. 9 A. 617 (F.B.).
3. (1889) I.L.R. 13 B. 520: 16 I.A. 156 (P.C.).
4. (1924) I.L.R. 48 M. 331: 48 M.L.J. 36 (F.B.).

F. B

Re the Powers of the newly Enrolled Statutory Advocates.

section 121 of the Insolvency Act, 1909. that Advocates have no right to act on Insolvency Side. Though the Legislature has power to alter that, yet a general enactment like the Bar Councils Act cannot be construed as repealing those special enactments. Under section 14 practice is confined to pleading alone so far as Insolvency is concerned. Under section 19 (4) there is no repugnancy between any section of the Act and the Insolvency Rules. Among the enactments repealed by the Bar Councils Act we find the Legal Practitioners Act, but not the Insolvency Act, 1909 or 11 and 12 Vict., which confined the acting on the Insolvency Side to Attorneys. They are special enactments and cannot be deemed to be impliedly repealed by the general enactment, Bar Councils Act. Maxwell, page 314, *The Theodora,*[5] *The London and Blackwall Railway Company* v. *The Board of Works for the Limehouse District,*[6] *Powell* v. *Kempton Park Racecourse Company,*[7] *Leach* v. *Rex,*[8] *Blackpool Corporation* v. *Starr Estate Co.*[9], and *Jones* v. *Williams.*[10] Attorneys have a vested right solely to act on the Insolvency Side and it cannot be interfered with in any way by any one.

[*Chief Justice.*—Your argument is that neither the High Court nor the Bar Council has any right to frame rules with regard to practice on the Insolvency Side, because of 11 and 12 Vict.]

Yes.

Practice, as I submitted before, only means pleading as far as Advocates on the Insolvency Side are concerned. The right which the Attorneys possess under Rule 128 of the Insolvency Side, solely to act, is still preserved; and there is no inconsistency as is contemplated by section 19, cl. (4). Inconsistency means incompatibility, *i.e.,* the two things cannot co-exist. There is no such incompatibility.

A. Krishnaswami Aiyar in reply.—The argument based on the general and special enactments is wholly beside the point. The Bar Councils Act is a consolidating and amending Act. The Letters Patent gave the High Court certain powers *re* enrolment of vakils, etc. That is abrogated. Where other enactments are repealed and a new Code is passed, that is a consolidating and amending Act in the scientific sense of the term.

5. (1897) Pro. 279.
6 (1856) 69 E.R. 1048.
7. (1897) 2 Q.B. 242 at 257.
8. (1912) A.C. 305.
9. (1922) 1 A.C. 27.
10. (1887) 36 Ch. D. 573 at 578.

F. B.

Re the Powers of the newly Enrolled Statutory Advocates.

Section 8 negatively, and section 14 affirmatively, lay down as to who are entitled to practise in the High Court. Rules inconsistent with the Act, such as Rule 128, shall not prevail.

The argument based on the Insolvency Act is fallacious.

Section 17 of the Charter Act gives the High Court power to frame rules with regard to right of practitioners to appear, plead and act. Section 30 of the Act of 1848 only lays down that the Advocates and Attorneys shall have the same rights as they were exercising in the Supreme Court. *Namberumal Chetty* v. *Narasimhachari.*[11]

Clause 17 of the Supreme Court Charter was read again. *In the matter of the petition of the Attorneys.*[12]

Clauses 9 and 10 of the Letters Patent were then read. An Advocate is not disentitled from acting. Section 8 of the High Courts Act was then referred to. The effect of the above Act was to enlarge the rights of the vakils on the Original Side.

Counsel then referred to section 4 of the Legal Practitioners Act and said that a judgment on the Insolvency Side was a judgment on the Original Side of the High Court. *In the matter of Candas Narrondas.*[3]

If the Insolvency Court is a part of the High Court, then under section 14 I claim the right to act and plead in that Court. If it is not a part of the High Court, it is either a Subordinate Court, or else a Court in British India other than a High Court. It must come under one of these categories. If so under S. 4 I have a right to act and plead in that Court.

Counsel then referred to sections 3, 112 and 121 of the Insolvency Act, 1909, and said: The Act left the rights of the practitioners as they were; and, under the Act, there was no rule-making power.

Rules 128 and 129 of the Insolvency Side are traceable to the Letters Patent and do not owe their origin to the Insolvency Act.

Krishnaswami Aiyar v. *Swaminatha Aiyar*[4] deals with the effect of S. 121 of the Insolvency Act. The point contended for by me is not really answered by *Krishnaswami Aiyar* v. *Swaminatha Aiyar.*[4]

Counsel then cited *Reg.* v. *Bird.*[13]

---

3. (1889) I.L.R. 13 B. 520: 16 I.A. 156 (P.C.).
4. (1924) I.L.R. 48 M. 331: 48 M.L.J. 36 (F.B.).
11. (1916) 31 M.L.J. 698 at 701. 12. (1875) I.L.R. 1 M. 24.
13. (1898) 2 Q.B. 340.

F. B.

Re the Powers of the newly Enrolled Statutory Advocates.

When a statute grants a right, any rule which in any way restricts or confines or abridges that right is a repugnant one and is *ultra vires*. A power to regulate does not include a power to restrict or prohibit. *Municipal Corporation of the City of Toronto* v. *Virgo.*[14] *Attorney-General for Ontario* v. *Attorney-General for the Dominion.*[15]

The Court delivered the following

Coutts Trotter, C. J.

JUDGMENTS. *Chief Justice.*—I have had the advantage of reading the judgment about to be delivered by my brother Kumaraswami Sastri and I entirely agree with it. It is clear that the object of the Act must be taken to have been to put all classes of practitioners on the same footing and if the Insolvency Jurisdiction of the Original Side were to be held to be on a different footing as regards the right of audience from the rest of its jurisdiction, it would obviously have been an anomaly left outstanding by the Act *per incuriam*. I confess that such a result would not have surprised me in so ill-considered and ill-drafted a measure as the Bar Councils Act. Moreover, with the mass of evidence collected by the Bar Committee in 1923-24, it is remarkable that those responsible for the Bar Councils Act made no attempt whatever to provide for the peculiar state of things obtaining in the Madras High Court which has no parallel in any other High Court in India. But I agree with my learned brother that we are not driven to hold that this anomaly still persists and I therefore concur in his judgment.

Kumaraswami

Kumaraswami Sastri, J.—The question for determination is whether Advocates enrolled under the Indian Bar Councils Act of 1926 are entitled to act in the Insolvency Jurisdiction of the High Court. Under the rules as they now stand, they are only entitled to plead.

The contention of the Advocates is that having regard to sections 8 and 14 and the definition of Advocates in S. 2 (*a*), they are, as a matter of right, entitled to practise in the High Court, that the word 'practise' in its ordinary meaning carries with it the right to appear, act and plead and that there being no differentiation of jurisdiction so far as the Bar Councils Act is concerned and no limitation placed on the word 'practise' in the Act, the rules hitherto in force which prevent Advocates from acting in the Insolvency Jurisdiction, can no longer prevent them from acting after the Act has come into force.

14. (1896) A.C. 88.

15. (1896) A.C. 348 at 365.

F. B.

Re the Powers of the newly Enrolled Statutory Advocates.

Kumaraswami Sastri, J.

For the Attorneys it is argued that the Insolvency Jurisdiction of the High Court is a separate jurisdiction which had its inception in the Indian Insolvency Act, 11 and 12 Vict. c. 21, which was repealed by the Presidency Towns Insolvency Act of 1909, which transferred the jurisdiction to the High Court, that under the Indian Insolvency Act, Advocates were only entitled to plead and Attorneys were only entitled to act in the Insolvency Jurisdiction, that section 121 of the Presidency Towns Insolvency Act expressly reserves to Advocates and Attorneys the rights they had under the Indian Insolvency Act and that the Bar Councils Act, which does not purport to deal with Insolvency Jurisdiction, cannot be invoked to give Advocates a large right of audience than that which existed at the date of the passing of the Act, and that the Indian Insolvency Act and the Presidency Towns Insolvency Act being special enactments dealing with special jurisdiction, they cannot be controlled or affected by the Bar Councils Act which is a general enactment. It is also argued that even if the Bar Councils Act should apply, section 19 (4) saves all rules in force which are not inconsistent with the Act, and that the rules framed by the High Court under the Letters Patent which confine the Advocates to plead only in the Insolvency Court are not inconsistent with the Act and cannot, therefore, be said to be impliedly repealed.

Before dealing with these contentions it is necessary to refer to the rules and orders which were in force at the date when the Bar Councils Act came into force in so far as they relate to the Insolvency Jurisdiction of the High Court.

The history of the legislation as regards the rights of Advocates, Attorneys and Vakils in so far as it relates to the Original Side of the High Court has been traced with great clearness in *Namberumal Chetti* v. *Narasimhachari*,[11] where the question as to the rights of Vakils and Attorneys were raised. So far as Advocates and Attorneys are concerned, the rules framed by the High Court as regards the Original Civil Jurisdiction are the same as those framed as regards the Insolvency Jurisdiction. The power of the High Court to frame rules in respect of the Insolvency Jurisdiction is derived from the Charter Act and the Letters Patent constituting the Madras High Court.

Section 17 of the Charter Act of 1800 empowered the Supreme Court

"to approve, admit and enrol such and so many of the persons being *bona fide* practitioners of the Law in the said Court of the Recorder of Madras

11. (1916) 31 M.L.J. 698.

F. B.

Re the Powers of the newly Enrolled Statutory Advocates.

Kumaraswami Sastri, J.

or having been admitted Barristers in England or Ireland or having been admitted attorneys or solicitors in one of our Courts at Westminster or being otherwise capable according to such rules and qualifications as the said Court shall, for that purpose, make and declare, to act as well in the character of Advocates as of Attorneys in the said Court, which persons so approved, admitted and enrolled as aforesaid, shall be and are hereby authorised to appear and plead and act for the suitors in the said Court."

And it declares

"that no other person whatsoever shall be allowed to appear and plead or act in the said Supreme Court of Judicature at Madras for and on behalf of such suitors or any of them."

Under the Charter Act, it is therefore clear that the Supreme Court had power to enrol Advocates who could be authorised by the rules both to act and plead in the Supreme Court, though as a matter of fact no such rules were made, and so far as the Supreme Court was concerned, the Advocates were only empowered to plead and not to act.

The Letters Patent constituting the High Court at Madras abolished the Supreme Court and transferred its jurisdiction to the High Court. The Advocates and Attorneys who were enrolled by the Supreme Court were enrolled as Advocates of the High Court.

Clause 9 of the Letters Patent gave the High Court power to approve, admit and enrol such and so many Advocates, Vakils and Attorneys as to the said High Court shall seem meet; and such Advocates, Vakils and Attorneys shall be and are hereby authorised to appear for the suitors of the said High Court, and to plead or to act or to plead and act for the said suitors, according as the said High Court may by its rules and directions determine, and subject to such rules and directions.

Clause 10 gives the High Court power to frame rules for the qualification and admission of proper persons to be Advocates, Vakils and Attorneys-at-Law.

As regards Insolvency Jurisdiction, clause 18 directs that the Court for the relief of insolvent-debtors shall be held before one of the Judges of the said High Court of Judicature at Madras and the said High Court, and any such Judges thereof, shall have and exercise, within the Presidency of Madras, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent-debtors in India.

F. B.

Re the Powers of the newly Enrolled Statutory Advocates.

Kumaraswami Sastri, J.

So far as the power to make rules empowering vakils to appear, act and plead on the Original Side of the High Court it has been held that such power was within the competence of the High Court by a Full Bench as early as 1875 in *In the matter of the Petition of the Attorneys.*[12] The question was again raised but the rules were held to have been validly framed. (See *Namberumal Chetty* v. *Narasimhachari*[11]).

As regards the Insolvency Court, however, the rules framed by the Madras High Court did not authorise vakils to appear in the Insolvency Court or Advocates to act.

Rules 128 and 129 of the Insolvency Rules run as follows:

Rule 128—"An Advocate may appear and plead upon any hearing in Court or in Chambers: provided that the taxing officer shall not, as between party and party, allow any fee in respect of his attendance at Chambers, unless the Judge certifies that the case is a proper one for the attendance of an Advocate."

Rule 129—"An Attorney may appear, plead and act upon all proceedings: provided that he shall not be allowed to appear or plead upon a hearing in Court."

So far as the Bombay High Court is concerned, Rule 36 states that Advocates may appear and plead for suitors on any side of this Court and in the Insolvent Court but not (except for an insolvent in the Insolvent Court or for a prisoner in the Criminal Court) unless instructed by an Attorney, or in the Appellate Side of the Court, by a pleader.

In Calcutta only Barristers enrolled as Advocates instructed by Attorneys could appear in the Insolvency Jurisdiction. After the passing of the Presidency Towns Insolvency Act, the question as to the right of Vakils to practise in the Insolvency Side was raised, but a Full Bench of this Court negatived the right. (See *Krishnaswami Aiyar* v. *Swaminatha Aiyar.*[4])

Having regard to the provisions of the Charter Act and the Letters Patent which I have already referred to, it seems to me that the High Court had power to frame rules allowing Advocates to *act* in the Insolvency Jurisdiction, though it did not do so. The Legislature has power to legislate on the matter without any necessity to repeal any enactment relating to insolvency.

I am unable to agree with the contention of Mr. Srinivasa Aiyangar that there is anything in the Indian Insolvency Act (11 and 12 Vict. c. 21) which curtails the power of the High Court conferred on it by the Charter Act and the Letters Patent

4. (1924) I.L.R. 48 M. 331: 48 M.L.J. 36 (F.B.).

11. (1916) 31 M.L.J. 698.

12. (1875) I.L.R. 1 M. 24.

F. B.
Re the Powers of the newly Enrolled Statutory Advocates.
Kumaraswami Sastri, J.

to entitle Advocates to act as well as to plead in the Insolvent Court.

The material portion of section 3 of the Indian Insolvency Act is as follows:—

"And every Advocate and Attorney of the said Supreme Courts at Calcutta, Madras and Bombay, respectively, shall be entitled to practise in the way of his profession in the Court for the relief of insolvent-debtors of that Presidency and no other persons shall practise as Advocates or Attorneys in the said Courts for the relief of insolvent-debtors."

It is no doubt true that when the Act was passed it was only the Attorneys that were entitled to act in Court and Advocates were only entitled to plead. It should be remembered that when this Act was passed, the Supreme Court, which was constituted under the Charter Act of 1800 had, under section 17, power to enrol Advocates with powers to appear, act and plead. The Supreme Court Charter was repealed by the Letters Patent which, as I pointed out before, empowers the High Court to frame rules, and the High Court as the successor of the Supreme Court and the possessor of the powers conferred on it by the Letters Patent was in my opinion competent to enrol Advocates who could act as well as plead.

The power of the High Court as regards vakils was affirmed in the cases reported in *In the matter of the petition of Attorneys*[12] and *Nambarumal Chetty* v. *Narasimhachari*[11] already referred to, and unless it can be shown that there is anything in the Indian Insolvency Act (11 and 12 Vict. c. 21) which curtails the power to frame rules permitting Advocates to act and plead on the Insolvency Side, the same reasoning would apply to the rules framed under the Insolvency Act. The words "shall be entitled to practise in the way of his profession" in section 3 of the Indian Insolvency Act simply means shall be entitled to practise as Advocate or Attorney as he was doing before and does not amount to a statutory bar to Advocates acting in the Court constituted by the Act nor does it override the powers given to the High Court under the Charter Act and the Letters Patent.

Section 121 of the Presidency Towns Insolvency Act confers no fresh right. It runs as follows:

"Nothing in this Act, or in any transfer of jurisdiction effected thereby, shall take away or affect any right of audience that any person may have had immediately before the commencement of this Act, or shall be deemed to confer such right in insolvency matters on any person who had not a right of audience before the Courts for the relief of insolvent-debtors."

11. (1916) 31 M.L.J. 698.
12. (1875) I.L.R. 1 M. 24.

F. B.
Re the Powers of the newly Enrolled Statutory Advocates.
Kumaraswami Sastri, J.

All that this section says is that no fresh rights are conferred on any person by reason of the transfer of jurisdiction, and it cannot be said that this Act curtailed the powers of the High Court to frame rules defining the functions of Advocates, if it was authorised to do so under the Letters Patent.

In my view, at the date of the passing of the Bar Councils Act, the High Court had power to frame rules enabling Advocates to act and plead in the Insolvency Jurisdiction though it did not exercise that power.

There being no statutory bar to Advocates acting and pleading in the Insolvency Jurisdiction, I think there is no necessity for the amendment or repeal of section 3 of the Indian Insolvency Act or section 121 of the Presidency Towns Insolvency Act before Advocates can be allowed to act. It was within the competence of the High Court to give the power by rules and it follows that the Legislature can do so by an Act without the necessity of repealing anything in any previous enactment or any special reference to the Insolvency Jurisdiction.

In the view I take, it is unnecessary to consider the cases referred to by Mr. Srinivasa Aiyangar as regards general later Acts not controlling or affecting earlier special enactments.

The next point for consideration is whether the Bar Councils Act confers the power to act and plead on Advocates in all the jurisdictions of the High Court so far as Madras is concerned and whether Rules 128 and 129 of the Insolvency Rules referred to must be taken to be no longer in force as they have been superseded by the provisions of the Bar Councils Act.

Section 2 (*a*) of the Bar Councils Act defines an Advocate as meaning an Advocate entered in the roll of Advocates of a High Court under the provisions of the Act.

Section 8 runs as follows:—

"(1) No person shall be entitled as of right to practise in any High Court unless his name is entered in the roll of the Advocates of the High Court maintained under this Act:

Provided that nothing in this sub-section shall apply to any Attorney of the High Court."

Then follow the provisions as to the persons who are to be enrolled.

Section 14 runs as follows:—

"(1) An Advocate shall be entitled as of right to practise:

(*a*) subject to the provisions of sub-section (4) of section 9 in the High Court of which he is an Advocate, and

(*b*) save as otherwise provided by sub-section (2) or by or under any other law for the time being in force, in any other Court in British

India and before any other tribunal or person legally authorised to take evidence, and

(c) before any other authority or person before whom such Advocate is by or under the law for the time being in force entitled to practise."

F. B.
Re the Powers of the newly Enrolled Statutory Advocates.
Kumaraswami Sastri, J.

Section 14 (3) gives the High Courts of Bombay and Calcutta a power to frame rules regulating the rights of Advocates on the Original Side.

Section 9 (1) empowers the Bar Council with the previous sanction of the High Court to make rules to regulate the admission of persons to be Advocates of the High Court.

Section 9 (4) saves the rule-making powers of the High Courts of Bombay and Calcutta as regards the practitioners on the Original Side.

Section 19 (4) which is the saving clause as regards the rules in force runs as follows:—

"When this Act has come into force in respect of any High Court, any provision of any other enactment or any order, scheme, rule, form or bye-law made thereunder which was before that date applicable to Advocates, Vakils or Pleaders entitled to practise in such High Court shall, unless such a construction is repugnant to the context or to any provision made by or under this Act, be construed as applying to Advocates of the High Court enrolled under this Act."

The Bar Councils Act by section 19 (2) repeals the Letters Patent in so far as it refers to the powers of the High Court to enrol Advocates and Vakils. It seems to me to be clear from the provisions above referred to that the Bar Councils Act, so far as Madras is concerned, makes no distinction as regards the different jurisdictions of the High Court, gives the High Court no power to frame rules so far as the Original and Insolvency Sides are concerned to limit the functions of Advocates only to plead, and prevent them from acting, and keeps alive only such rules as the Madras High Court has already framed if they are consistent with the provisions of the Act.

It is to be noted that while the rule-making powers of the Bombay and Calcutta High Courts, so far as the Original Side is concerned, are saved, no such saving clauses are enacted so far as the Madras High Court is concerned. It was evidently thought that as the Madras vakils were authorised to appear, act and plead on the Original Side, the Madras High Court offered a fair field for trying the experiment of unifying the Bar which was the policy underlying the Act.

The word "practise" ordinarily means, appear, act and plead, unless there is anything in the subject or context to limit its meaning. The word 'practise' is used in section 4 of the Legal

F. B.
Re the Powers of the newly Enrolled Statutory Advocates.
Kumaraswami Sastri, J.

Practitioners Act of 1879 and it was held by Jwala Prasad, J., in *Laurentius Ekka* v. *Dhuki Koeri*[1] that the word "practise" includes the right to appear, plead and act. I may in this connection refer to *Bakhtawar Singh* v. *Sant Lal*[2] where it was held that Advocates can act and plead unless there is anything in the rules framed by the High Court restricting their power.

I think that sections 8 and 14 of the Bar Councils Act which entitle an Advocate as of right to practise in the High Court entitle an Advocate of the Madras High Court to appear, act and plead in all the jurisdictions of the Madras High Court. If this view is correct, it follows that any rules which cut down that right to plead alone would be repugnant to the provisions of sections 8 and 14.

I do not think it makes any difference whether the Court for the relief of insolvent-debtors is a separate Court or is only a part of the High Court's Original Civil Jurisdiction. If the Court is a separate Court, it will be a Court falling under clause (*b*) of section 14. As appeals lie to the High Court, it will be a Court subordinate to the High Court and section 4 of the Legal Practitioners Act will also apply. If Insolvency Jurisdiction is part of the High Court's Original Side Jurisdiction section 14, clause (*a*) will apply.

I am unable to agree with the contention of Mr. Srinivasa Aiyangar that as an Advocate is allowed to practise in the High Court, even if he is prevented from acting in the Insolvency Court, there is no repugnancy. I am of opinion that where an Act confers rights to a party in general terms and entitles him to perform more than one function, the cutting down of those rights by a rule would make that rule repugnant to the provisions of the Act. The following observations of Wills, J., in *Reg* v. *Bird. Ex parte Needes*[13] are in point:

"I desire in my judgment to adopt a broad principle which is too clear to need cases to be cited for its justification—the principle that where a power to make regulations is given to a public body by statute, no regulations made under it can abridge a right conferred by the statute itself."

I may also refer to the *Municipal Corporation of the City of Toronto* v. *Virgo*.[14]

I am of opinion that Advocates enrolled in the Madras High Court under the provisions of the Bar Councils Act are

1. (1925) I.L.R. 4 Pat. 766.
2. (1887) I.L.R. 9 A. 617 (F.B.).
13. (1898) 2 Q.B. 340.
14. (1896) A.C. 88.

entitled to act and plead in the Insolvency Jurisdiction of the High Court.

Pakenham Walsh, J.—I agree and have nothing to add.

A.S.V.

K. B. *Re* the Powers of the newly Enrolled Statutory Advocates.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE MADHAVAN NAIR.

Shariba Beebi *alias* Ammani Ammal .. *Petitioner* (Respt.-Plff.)*

v.

Abdul Salam and another .. *Respondents (Petnrs.—Defts. 1 and 2).*

Shariba Beebi *v.* Abdul Salam.

Limitation Act (IX of 1908), Art 164—Due service—Substituted service effected under Order 5, Rule 20, Civil Procedure Code—If amounts to due service.

Substituted service duly effected under Order 5, Rule 20 of the Civil Procedure Code is as effectual as if it had been made on the defendant personally and must be deemed to be "due service" within the meaning of Article 164 of the Limitation Act.

Doraiswami Aiyar v. *Balasundaram Aiyar,* (1926) 52 M.L.J. 477 and *Narasimha Chettiar* v. *Balakrishna Chetty,* (1926) 52 M.L.J. 512 followed.

Venkatachalam v. *Subbayya,* (1927) 54 M.L.J. 448 not followed.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the District Munsif of Dindigul, dated the 12th March, 1927, in I.A. No. 705 of 1926 in O.S. No. 5 of 1925.

T. L. Venkatarama Aiyar for petitioner.

K. G. Srinivasa Aiyar for respondents.

The Court delivered the following

JUDGMENT.—This is an application against an order restoring a suit to file which had been dismissed *ex parte.* The defendants are said to have been served by substituted service but they did not appear, and not until a year after the date of the decree did they apply to set it aside. The District Munsif has merely found, because he thinks that the defendants had a good defence to the suit, that they could not have had notice, and if they had been properly served, they would not have failed to appear, and finding that they could not have been properly served, he restored the suit. If, however, substituted service was effected under Order 5, Rule 20, such service is as

*C.R.P. No. 607 of 1927. 16th November, 1927.

Sharifa Beebi v. Abdul Salam.

effectual as if it had been made on the defendant personally, and must be deemed to be due service within the meaning of Article 164 of the Limitation Act. This view has been held in two previous cases, *Doraiswami Aiyar* v. *Balasundaram Aiyar*[1] and *Narasimha Chettiar* v. *Balakrishna Chetty*,[2] to the latter of which one of us was a party. The contrary view was taken by Srinivasa Aiyangar, J., in *Venkatachalam* v. *Subbayya*,[3] but in coming to his conclusion he had not adverted to the provisions of Order 5, Rule 20, clause 2 and with all respect we are unable to accept his view as against the provisions of that section.

A further contention is raised that no revision petition under section 115 can be entertained in the present case. As however the District Munsif has refused to take evidence merely because he thinks that certain facts are probable, we think that this is certainly a material irregularity in the exercise of his jurisdiction. There are allegations in the respondent's affidavit to the effect that he was fraudulently kept out of knowledge of the proceedings in Court, and the question of whether substituted service was duly effected has not been tried by the District Munsif. We must, therefore, set aside his order and remand the petition to him for fresh disposal after admitting any evidence on this point which may be adduced and in the light of the above remarks.

Costs of this petition will abide the result.

N.S. *Petition allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Chairman, Municipal Council, Chidambaram .. *Petitioner** *(Complainant)*

v.

Thirunarayana Aiyangar .. *Accused* *(Respondent).*

*Chairman, Municipal Council, Chidambaram v. Thirunarayana Aiyangar.

Madras District Municipalities Act (V of 1920), Ss 249, 321 (5) and 338 (b)—License for keeping a coffee-hotel—Cancellation of license by Chairman of Municipal Council for reason other than the violation of the terms of the license—If ultra vires *of the powers of the Chairman—Pro-*

*Cr.R.C. No. 612 of 1927.
Cr.R.P. No. 545 of 1927. 15th December, 1927.

1. (1926) 52 M.L.J. 477.
2. (1926) 52 M.L.J. 512.,
3. (1927) 54 M.L.J. 448.

Chairman, Municipal Council, Chidambaram v. Thirunarayana Aiyangar.

secution for carrying on business without license—Power of Court to go into the question of the legality of the order cancelling the license.

A license which has been granted under the Madras District Municipalities Act by the Chairman of a Municipality to a person for keeping a coffee-hotel can be cancelled only for the violation of any of the conditions or the terms of the license; and the cancellation of the license by the Chairman for any other reason such as non-payment of the water-tax is *ultra vires* of his powers.

Where a prosecution is launched under S. 338 (*b*) of the Madras District Municipalities Act against the coffee-hotel keeper for carrying on the business after the cancellation of the license by the Chairman for any reason other than the violation of the terms of the license, it is open to the Court to go into the question whether the order of the Chairman cancelling the license was within his powers or *ultra vires* A distinction should be drawn between the case of the cancellation of a license which a person has properly obtained and the case of the refusal of a license asked for the doing of a thing In the latter case, it would not be open to the Court to consider whether the reasons of the Chairman for the refusal were good or bad.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Chidambaram in C.C. No. 35 of 1927, dated 10th June, 1927.

T. R. Ramachandra Aiyar for *S. R. Dikshit* for petitioner.

The Public Prosecutor for the Crown.

M. Patanjali Sastri for accused.

The Court made the following

ORDER.—This is an application to revise the order of the Sub-divisional First Class Magistrate of Chidambaram acquitting the accused in a prosecution launched by the Municipal Council of Chidambaram under section 338 (*b*) read with sections 249 and 321 of the District Municipalities Act.

The facts of the case are. The respondent, a coffee-hotel keeper, had a license for carrying on business of coffee-hotel keeper for the year 1926-27. As he disobeyed the order of the Chairman in connection with some matter not connected with the license, the Chairman gave notice that he had cancelled his license. Notwithstanding the cancellation, the respondent continued to carry on business as coffee-hotel keeper and he was prosecuted for keeping a coffee-hotel without a license as required by section 249 and Schedule V of the District Municipalities Act. The learned Sub-divisional Magistrate acquitted the respondent on the ground that the prosecution had failed to prove that there was any justification for the order cancelling

Chairman, Municipal Council, Chidambaram v. Thirunarayana Aiyangar.

the license. The Chairman, Municipal Council, Chidambaram, has preferred this Criminal Revision Petition.

The contention of Mr. T. R. Ramachandra Aiyar for the petitioner is that it was not open to the Magistrate to consider the question whether the cancellation was proper or improper and that after the license was cancelled the respondent carried on business without a license and therefore he is liable to be punished under section 338 (*b*).

The question for consideration in this case is whether the Criminal Court could consider whether the order, cancelling the license, was within the jurisdiction of the Chairman. The argument of Mr. Ramachandra Aiyar is that under section 249 a license is necessary for keeping a coffee-hotel. Under cl. 6 of section 321 it shall be the duty of the Chairman to inspect places in respect of which a license or permission is required by or under the Act and he may enter any such place between sunrise and sunset in order to satisfy himself that the conditions of the license are observed; and if any of the terms of the license are violated, the Chairman has power to cancel the license. It is argued that, the Chairman having cancelled the license, the respondent ceased to have a license, for, the moment a license is cancelled it ceases to be in operation and his carrying on business after the cancellation would be carrying on business without a license; for clause 7 says:

"When any license or permission is suspended or revoked, or when the period for which it was granted, or within which application for renewal should be made, has expired, whichever expires later, the grantee shall for all purposes of this Act or any rule made under this Act be deemed to be without a license or permission until the order suspending or revoking the license or permission is cancelled, or subject to sub-section (11) until the license or permission is renewed, as the case may be."

The question is whether a license which has been granted by the Chairman can be cancelled for any reason other than for a violation of any of the conditions or the terms of the license, and the second question is whether the Court can, in dealing with the accused under section 338, go into that question. As regards the first question, whether the Chairman could cancel a license for any other reason or for no reason, it has to be considered in connection with the provisions of the Act. The Chairman can cancel the license under section 321 (5) only for the contravention of any of its terms, and it is not open to him to cancel the license for any reason that he thinks proper. In this case the reason for cancelling the license is the non-payment by the respondent of the water-tax. However reprehensible the conduct

Chairman, Municipal Council, Chidambaram v. Thiru-narayana Aiyangar.

of the respondent may be in not paying the water-tax due to the Municipality, that would not be a ground for cancelling his license to carry on the business of a coffee-hotel keeper. Therefore the cancellation of the license was *ultra vires* the Chairman of the Municipal Council.

The next question is whether the Court could go into that question in a prosecution launched by the Municipality under section 338. The contention of Mr. Ramachandra Aiyar is that it is not open to the Court to go into the validity or otherwise of the cancellation because it is outside the province of the Court trying an accused person for an offence under the Municipal Act to go into the question whether any order made by the Municipal Chairman is proper or improper. Section 338 makes punishable the doing of any act if that act is done without license or permission or registration or in a manner inconsistent with the terms of any such license or permission, and under clause (*a*) the Chairman may give notice to the person doing the act to alter, remove or, as far as practicable, restore the whole or any property within the time specified in the notice. Then clause (*b*) says:

"If no penalty has been specially provided in this Act for so doing such act, the person so doing it shall be liable on conviction before a Magistrate to a fine not exceeding fifty rupees for every such offence."

It is not denied that carrying on a hotel-keeper's business without a license is an offence punishable under section 338. But the respondent having had a license, the improper or illegal cancellation of it by the Chairman does not deprive him of the license which he obtained properly and the terms of which he has not in any way violated. A distinction has to be drawn between a case of refusal of a license asked for the doing of a thing and the cancellation of a license which a person has properly obtained. In the case of a refusal of a license for a bus it may be that the Municipal Chairman has some reason for refusing it and it would not be open to the Court to consider whether the reasons were good or bad; for no reasonable man who is acting as Chairman would refuse to grant a license unless he has some reason for refusal. But if it is patent to the Court that there could have been no reasons, the Court could come to the conclusion that the refusal amounted to not doing what is required by the Act but something which is outside the Act and such refusal might be considered to be *ultra vires* the Chairman. In the case of a license which has been granted, and which is good for a period, it would be *ultra vires* the Chairman of the Council to cancel it or suspend it not for something which

Chairman, Municipal Council, Chidambaram v. Thirunarayana Aiyangar.

the licensee did in the contravention of the terms of the license but for something which was unconnected with the license. In such cases the Court is not prevented by anything contained in the District Municipalities Act from holding that such an act was not within the ambit or within the scope of the powers vested in the Chairman of the Council by the Act and therefore the reason for doing such an act would not arise for consideration. I think on this principle the various cases on the interpretation of the several sections of the District Municipalities Act can be reconciled.

Reliance is placed by Mr. Ramachandra Aiyar upon *Muthu Baku Chetti* v. *Chairman, Madura Municipality, Madura*[1] in support of his position that it is not open to the Magistrate to go into the validity of the order of the Chairman cancelling the license. That case does not help him. In that case it was held that it was not open to the Court to question the validity of the rules framed under the District Municipalities Act. The learned Judges observe at page 636:

"The offence charged is under section 338 of the Act and consists of using the rice-mill without the license prescribed by any rule, by-law or regulation made under the Act The necessary rules have been framed in this case and it is not within the province of a Criminal Court to determine whether such rules have been validly framed, a matter which should be left for determination in a Civil Court"

If the Criminal Court were to go into the validity of the terms of the license that would be outside the province of the Court, but it is open to the Court to consider whether the Chairman acted within the powers given to him by the rules framed under the Act for the issue of licenses under the Act. That the Municipality cannot act in contravention of the Act is a well-established proposition. The Municipality is a statutory body and it cannot act in contravention of the terms of the statute by which it is created. In *Queen-Empress* v. *Veerammal*[2] a person applied for a building license and the Municipality refused to grant the license on the ground that the land proposed to be built on was required for municipal purposes. Notwithstanding the refusal of the Municipality to grant a building license the party put up the building. Then an order was served upon the party to remove the building but the party refused to remove the building whereupon a prosecution was launched and a Bench consisting of Justices Muthuswami Aiyar and Best set aside the conviction on the ground that the Municipality acted

1. (1927) 53 M.L.J. 633 (F.B.). 2. (1892) I.L.R. 16 M. 230.

Chairman, Municipal Council, Chidambaram v. Thirunarayana Aiyangar.

outside its powers in refusing a license. Mr. Justice Best observed:

"The order of the Council directing Veerammal to abstain from building on a portion of her land was *ultra vires;* and their further notice directing her to remove the building for no other reason than that it had contravened such order was illegal, and therefore not one that she was bound to obey."

It is unnecessary to consider in detail some of the cases quoted by Mr. Patanjali Sastri such as those in *Municipal Council, Chicacole* v. *Seetharamayya Naidu*,[3] *Ramachandran Servai* v. *President, Union Board, Karaikudi*[4] and *Taluk Board, Bandar* v. *Zamindar of Chellapalli*.[5] It was held by Mr. Justice Oldfield and Mr. Justice Krishnan in *In re Sesha Prabu*[6] that the validity of a notification under the Act could be questioned in a prosecution launched for violation of the notification. In that case the notification was published as if it was under the new District Municipalities Act of 1920. As a matter of fact, on the date of the notification, the District Municipalities Act had not come into force and the Court held that the notification published before the Act came into force was not a valid notification and the accused who acted in contravention of that notification was not guilty of an offence under the new Act. Reliance is placed by Mr. Ramachandra Aiyar upon a decision of Mr. Justice Krishnan reported in *Krishnaswami* v. *Emperor*.[7] In that case Mr. Justice Krishnan upheld the conviction for driving a car without a license and the accused's contention was that the President of the District Board to whom he applied for license improperly refused to grant a license and that he was justified in driving it without a license. Mr. Justice Krishnan observed:

"I do not think that his order can be regarded as an absolute nullity as is argued and the case considered as one in which no order has been passed. It may be that the accused can claim damages against the President if he is able to establish that the President exercised his powers under S 212 not *bona fide* but with malice on account of personal ill-feeling against him. That question will have to be considered when a proper case is brought, but, in this prosecution, the accused, in order to escape punishment, must show that he had a license given by the President of the District Board or he comes under clause 11 of section 212."

This decision is not against the principle that when the President of a District Board or the Chairman of a Municipal Council acts *ultra vires,* his order cannot but be invalid and a violation of

3. (1925) 21 L.W. 280.
4. (1925) I.L.R. 49 M. 888: 49 M.L.J. 356.
5. (1920) I.L.R. 44 M. 156: 40 M.L.J. 91.
6. (1921) 42 M.L.J. 149.
7. (1924) 48 M.L.J. 132.

Chairman, Municipal Council, Chidambaram v. Thirunarayana Aiyangar.

the order cannot be the subject of a criminal charge. It may be that the refusal to grant a license may be for proper and valid reasons and the Court cannot go into the validity of the reasons or the expediency of the occasion which necessitated the refusal of the license and a Court is bound to assume that the Chairman acted properly; but where he is bound to do a certain thing and he does not do it, or where he is not permitted to do a thing and he does it, it cannot be said that the Court could not go into the question of the validity of the omission or act especially when a prosecution is launched against a person for violating the illegal or *ultra vires* order of omission or the act of the Chairman. A prosecution under section 338 is a criminal prosecution in which a person is sought to be convicted. In order to sustain a conviction it must be shown that the accused violated a legal order which a public servant or a statutory body was authorised under the law to pass. As observed by Mr. Justice Krishnan in *In re Smith*[8] at page 734:

"The prosecution must establish affirmatively to his satisfaction that the tax was payable and that there was a default in payment of the tax. The fact that the accused did not appeal to the Standing Committee cannot be treated as in any way preventing him from raising the plea before the Criminal Court, where he is sought to be convicted of an offence by the prosecutor."

This observation meets the argument of Mr. T. R. Ramachandra Aiyar that the respondent should have appealed to the Council against the order of the Chairman and if he did so the Council could have put it right. Supposing the Council did not choose to put the matter right, would he be liable to be convicted under section 338. I have no hesitation in holding that, where an act is *ultra vires* a statutory body, whether it be of the Chairman or of the whole Council, the Court which is asked to convict a person for the violation of the order of the statutory body is not prevented from considering the legality of the order. Where the order is within the powers of the Chairman or the Council or sanctioned by the rules framed under the Act, it is not open to the Magistrate or the Court to go into the necessity, expediency or the reasonableness of the order. In this case the order of the Chairman was *ultra vires*, and, that being so, the license cannot be said to have been cancelled and the respondent cannot be said to have been trading or carrying on business without a license. The order of the Lower Court is right and the petition is dismissed.

N.S. *Petition dismissed.*

---

8 (1923) 45 M L.J. 731.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE.

The Public Prosecutor .. *Appellant* in all the appeals*

v.

Ramayya Mudaliar and others .. *Accused.*

The Public Prosecutor *v.* Ramayya Mudaliar.

Madras Local Boards Act (XIV of 1920), Ss. 24 and 223—Persons expressly authorised to file complaints—If confined to persons to whom the President may delegate his authority under S 24

Section 223 of the Madras Local Boards Act of 1920 should not be read as limited by section 24. The persons who can be expressly authorised under section 223 to file complaints are not confined to those to whom the President may delegate his authority under section 24.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Stationary 2nd Class Magistrate of Thiruthuraipundi in C.C. Nos. 362, 365, 367 and 364 of 1926.

S. Parthasarathi and *V. K. Thiruvenkatachari* for accused.

P. Govinda Menon, amicus curiae.

The Court made the following

ORDER.—The Public Prosecutor does not press these appeals except to elicit from this Court an expression of opinion as to the propriety of the proposition of the Lower Court that section 223 of the Madras Local Boards Act, 1920, must be read as limited by section 24. I am clear that the persons who can be expressly authorised under section 223 to file complaints are not confined to those to whom the President may delegate his authority under section 24. Had that been the intention, I think section 223 would have read "expressly authorised under section 24." The proper procedure, I take to be this. The Union sanctions the prosecution and the President of the Union Board then expressly authorises some person, usually some responsible subordinate, to file the complaint. The authority should naturally be produced with the complaint, so that the Court may be satisfied of the authorisation, which alone gives it power to entertain the complaints. With these remarks the appeals are dismissed.

N.S. *Appeals dismissed.*

---

*Cr.A. Nos. 405, 483, 484 and 485 of 1927. 2nd February, 1928.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY.

Indur Pattabhirami Reddi .. *Appellant** (*2nd Deft.*)

v.

Kamisetty Balliah .. *Respondent* (*Plff.*).

Pattabhirami Reddi *v.* Kamisetty Balliah.

Negotiable Instruments Act (*XXVI of* 1881), *S.* 27—*Partnership of three persons—Promissory note signed by two of them in their own names—Promissory note stated to be executed by the firm and reciting receipt of consideration for necessities of the firm—Liability of the third partner.*

Where a promissory note which was signed by two persons, who formed a partnership with another person, in their own names without any words following their signatures to describe in what capacity they signed the note, was stated to be executed by the firm and recited that the amount of consideration was received on account of the necessities of the firm,

Held, that the name of the firm as the party liable was sufficiently disclosed and the third partner who had not signed the note was also liable.

Sadasuk Janki Das v. *Sir Kishan Pershad* [(1918) I.L.R. 46 Cal. 663: 36 M.L.J. 429 (P.C.)] referred to.

Second appeal against the decree of the Court of the Additional Subordinate Judge of Nellore in A.S. No. 155 of 1924 (A.S. No. 239 of 1924, District Court, Nellore), preferred against the decree of the Court of the Principal District Munsif of Nellore in O.S. No. 452 of 1922.

K. V. Krishnaswami Aiyar for appellant.

S. Varadachariar and *S. V. Venugopalachari* for respondent.

The Court delivered the following

JUDGMENT.—It is not disputed that defendants 1 and 3 were partners in a firm with defendant 2 and that they had power to execute promissory notes binding on the firm. But Ex. A was signed only by defendants 1 and 3 in their own names without any words following their signatures to describe in what capacity they signed the note. Mr. Krishnaswami Aiyar for defendant 2 contends that, as they did not sign the note in the name of the firm or, at any rate, did not add any words to their signatures showing that they signed as partners of the firm or even that they were not signing merely in their personal capacities, defendant 2 cannot be liable on the note. *Koneti Naicker* v. *Gopala Aiyar*[1] and *Sri Yerruganti Chinna Venkatanarayanam* v. *Kota Giri Venkatanarasimha,*[2] on which he relies, do not go so far as to lay down that, if an executant of a promissory note is to be

*S.A. No. 755 of 1925. 25th July, 1928.

1. (1913) I.L.R. 38 M. 482: 25 M.L.J. 425.

2. (1913) M.W.N. 1005.

bound in any other than his personal capacity, that must be shown by his signature and cannot be effectively shown in any other way. Section 27 of the Negotiable Instruments Act provides that a person may be bound by a duly authorised agent "acting" in his name, not "signing" in his name. In *Sadasuk Janki Das* v. *Sir Kishan Pershad*[3] their Lordships of the Privy Council lay down that, if a principal is to be bound by an agent's signature to a promissory note, his name "must be disclosed in such a way that on any fair interpretation of the instrument his name is the real name of the person liable upon the bill." They do not say that there must be anything in the signature to show that the signatory signs, not for himself in his personal capacity, but for his principal. Indeed, if that were essential, a large part of their Lordships' judgment in that case would be superfluous. In the present case, Ex. A is stated in its first sentence to be executed "by the company of Adanki Bhujanga Rao and Induru Pattabhirama Reddi", and that, it is admitted, is the style of the firm. Then it proceeds "on account of the necessity of the company we have this day received", etc. In my opinion on a fair interpretation of that instrument, even though signed by defendants 1 and 3 with their names alone, the name of the firm as the party liable is sufficiently disclosed, and defendant 2 as a partner in the firm is therefore liable on the note.

In regard to interest, it appears that the firm bought forbearance by Ex. D, and I see no sufficient reason to interfere with the learned Subordinate Judge's decree except to the extent of making the interest at 24 per cent. run only from the date of Ex. D, leaving the interest at 9 per cent. under Ex. A up to that date. The propriety of this modification of the Subordinate Judge's decree is not disputed before me for the plaintiff.

The Subordinate Judge's decree will be modified in the manner indicated. In other respects the appeal is dismissed. The parties will pay and receive proportionate costs throughout.

N.S. *Decree modified.*

---

3. (1918) I.L.R. 46 C. 663: 36 M.L.J. 429 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Sreeram Ramakottiah and others .. *Petitioners**

v.

Chintalapudi Subba Rao and others .. *Respondents in Cr.R.C. No. 971 of 1927 (Accused).*

Ramakottiah *v.* Subba Rao.

Criminal Procedure Code (V of 1898), Ss 265, 366, 367—Bench of Magistrates—Trial by—Judgment in, signed by Presiding Officer only—Validity—Judgment in, prepared, signed, and delivered by him, after other members had left Court—Validity.

When the judgment of a Bench of Magistrates is prepared by the Presiding Officer it is sufficient if he alone signs it. It is not necessary that the other members of the Bench should sign it.

In a case tried by a Bench of Magistrates, the Presiding Officer wrote the judgment and signed and delivered it, after the other members of the Bench had left the Court,

Held, that the judgment was not a proper judgment and the conviction based thereon must be set aside.

Semble: Cases in which reasons need not be given in a judgment may stand on a different footing.

Semble: Even in cases in which reasons have to be given in a judgment, if all the members of the Bench are present at the preparation of, and concur in, the judgment prepared by the Presiding Officer, the mere delivery of it may be left to the latter.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgments of the Court of the 1st Class Bench of Magistrates of Ongole in B.C. Nos. 521, 604 and 603 of 1927 respectively.

V. L. Ethiraj and *A. Rangaswami Aiyangar* for petitioners in Cr.R.C. Nos. 969 and 970 of 1927.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown in both the cases.

G. Lakshmanna and *K. Kameswara Rao* for respondents in Cr.R.C. No. 971 of 1927.

The Court made the following

ORDER. *Cr.R.C. Nos. 969 and 970 of 1927.*—The point raised by Mr. Ethiraj in these two cases is that the judgment of the Bench was not signed by all the members of the Bench and that, therefore, it is no judgment at all. Under section 265, Criminal Procedure Code, judgments have to be prepared by the Presiding Officer of the Court. Under clause (2) the Government

---

*Cr.R.C. Nos. 969, 970 and 971 of 1927. 19th April, 1928.
(Cr.R.P. Nos. 872, 873 and 874 of 1927).

Ramakottiah v. Subba Rao.

may authorise any Bench of Magistrates empowered to try offences summarily to prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench taking part in the proceedings. Clause (3) is as follows:

"If no such authorisation be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record."

The contention of Mr. Ethiraj is that in the absence of authorisation under clause (2) by the Government, a record prepared by the presiding officer of the Bench should be signed as is provided for in clause (2). Clause (3) does not apply to the case of the preparation of record or judgment by the presiding officer of the Court. If the record is prepared by a member of the Bench and not by the presiding officer, it shall have to be signed by each member of the Bench taking part in the proceedings. But where the presiding officer himself prepares the record or judgment it is not necessary that the other members of the Bench should sign the record or judgment. Section 367 of the Criminal Procedure Code requires the presiding officer of the Court to write the judgment and it shall be dated and signed by him in open Court at the time of pronouncing it. That being so, when the judgment of a Bench is prepared by the presiding officer it is sufficient if he alone signs it. It is not necessary that the other members should sign it. In this case the presiding officer of the Bench signed the judgment and this point does not help the petitioner.

The next point is that the judgment was delivered at about 8-30 at night after the other members of the Bench had left the Court. The Magistrate in his explanation says that the other members of the Bench gave their opinion or verdict and left the Court and he afterwards wrote the judgment and signed it. Section 366 requires that the judgment of a Criminal Court should be pronounced by the Court and, if required by the accused, it shall be explained to him. When the members composing the Bench leave the Bench, there is no Court at all. The mere fact that the presiding officer sits in the Court-room and writes his judgment will not make that a Court. When a judgment is delivered, the members of the Bench who took part in the trial and who concurred or differed from the judgment should be present. Mr. Lakshmanna who appears in another case strongly urges that it is only an irregularity and should not be held to vitiate the judgment. I am unable to accept this contention.

Ramakottiah v. Subba Rao.

The judgment of a Criminal Court must be delivered in open Court when the Court is sitting. It is not at all proper that the judgment of a Bench which is practically the judgment of a number of Judges should be written and delivered by only one of them. No doubt if all the others had concurred in the judgment and told the presiding officer to deliver it that might be different. But they must be present to know what the judgment contains. There are cases in which reasons need not be given in a judgment. In such a case the matter may be different. But where a judgment contains reasons, other members of the Bench must either concur with the reasons or express their dissent from the reasons given by the presiding officer. In this case the preparation of the judgment after the other members of the Bench had left the Court cannot be said to be a proper judgment. In order to make the matter clear, I must observe that the mere delivery of a judgment may be left to the presiding officer by the other members of the Bench. But they must be aware of what the judgment contains and therefore they must approve of the whole of the judgment if a judgment is written, and if no judgment is written the requirements of section 263 must be complied with. All the members of the Bench should be present when the record is prepared as required by section 263. Section 264 applies to appealable cases, and in such cases all the members of the Bench must be present when a judgment is prepared. If the judgment is reserved, it must be read to them before it is delivered. I make these observations in order to prevent irregularities in the procedure of the Bench Magistrates. In these two cases, seeing that the judgment was prepared and delivered in the absence of other members of the Bench, I set aside the conviction and order a re-trial. The fines, if paid, will be refunded.

Cr.R.C. No. 971 of 1927.—In this case the judgment was prepared by the presiding officer in the absence of the other members of the Bench. The remarks that I have made with regard to the judgment in the other two cases apply to this. But this is a case of acquittal and seeing that this is a petty case, though the judgment is an illegal one, it is unnecessary to order a re-trial.

I therefore dismiss this petition.

A.S.V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Palaniyandi and another, minors by their guardian Vellammal .. *Appellants** (*Plffs.*)

v.

Veyilamuthu Pillai and 26 others .. *Respondents* (*Defts.*).

Palaniyandi *v.* Veyilamuthu Pillai.

Inam—Karnam service inam—Holder of inam removed from the office of karnam but continuing in possession of the lands attached to the inam—Death of holder leaving widow and daughter—Continuance in possession by the widow—Enfranchisement of inam in the name of the widow and the daughter—Deed of enfranchisement conferring freehold estate on the grantees—Subsequent alienation by the widow and the daughter reciting necessity for it and purporting to convey absolute title—Nature of estate taken by the alienee

The holder of a karnam service inam was removed from the office of karnam about a year before he died, but he managed to remain in possession of the lands attached to the inam till his death. He died leaving only a widow and a daughter. After his death his widow continued in possession of the lands The inam lands were enfranchised by the Government and the inam deed which was granted to both the widow and the daughter recited that the inam was confirmed to the two grantees in freehold, *i e*, that the inam was their own absolute property to hold or dispose of as they thought proper, subject only to the payment of the quit rent imposed. The widow and the daughter subsequently alienated some of these lands, reciting necessity for the alienation in the document and purporting to pass absolute title After the death of the widow and the daughter, the then existing reversioner brought a suit to set aside this alienation.

Held, that the effect of the inam title deed was tantamount to a resumption by the Government and a regrant to the widow and the daughter and what they got was the absolute title which was the estate conferred by the grant and not the limited right of a Hindu widow or daughter succeeding to the property of her husband or father, and that, as the vendors purported to convey full title, though by reciting necessity, the purchaser was entitled to rely upon the absolute title which the vendors had by virtue of the inam grant.

Venkata Jagannadha v. *Veerabhadrayya,* (1921) I.L.R. 44 Mad. 643: 48 I.A. 244: 41 M.L.J. 1 (P.C) referred to.

Appeal against the decree of the Court of the 1st Additional Subordinate Judge of Madura in Original Suit No. 45 of 1920.

S. Varadachariar and *K. S. Jayarama Aiyar* for appellants.

N. Kunjithapadam and *K. S. Venkataramani Aiyar* for respondents.

*A.S. No. 174 of 1924. 3rd February, 1928.

Palaniyandi v. Veyilamuthu Pillai.

Kumaraswami Sastri, J.

The Court delivered the following

JUDGMENTS. *Kumaraswami Sastri, J.*—This appeal arises out of a suit filed by the plaintiffs as the reversioners of one Sankaralingam Pillai, who died in 1872. Sankaralingam Pillai left a widow Kanthimathi Ammal and a daughter Thangammal. Thangammal died in 1902 and Kanthimathi Ammal died on the 29th December, 1911. The reversioner according to the plaintiffs at the date of the death of Kanthimathi Ammal when the reversion opened was one Subbiah Pillai, who died on the 1st October, 1917, leaving three sons, the 1st, 2nd and 3rd plaintiffs. The 2nd and 3rd plaintiffs were minors and the 1st plaintiff was a major at the date of the suit. The 1st plaintiff died in 1913 and the 2nd and 3rd plaintiffs continued the suit. It is not disputed that the suit was to declare the plaintiffs as reversioners and set aside the alienations made by the widow and daughter or the widow alone. It is not disputed that these lands which form the subject-matter of the appeal form part of a karnam inam. Sankaralingam Pillai was removed from the office of karnam about a year before he died but he managed to remain in possession of the lands and on his death his widow continued to be in possession. Subbiah Pillai claimed the lands and the office of karnam and wanted possession of those lands. The Revenue authorities however declined to interfere and referred Subbiah Pillai to a Civil Court. Afterwards Subbiah Pillai released all the lands which formed the karnam emoluments and another item of property which is the subject-matter of Appeal No. 455 of 1923 which we already disposed of. He released his rights to those properties—both the present rights which he had and the rights which he would have as reversioner. He got Rs. 600 as consideration for this release out of the sale of item No. 1 which the widow sold absolutely to a stranger. Ex. IV recites that the widow and the daughter began to alienate properties and create mortgages and *othis* over them and evidently Ex. IV was taken in order to see that there was no trouble caused by the claims of the executant Subbiah Pillai and the various alienees and also to give the widow a right to dispose of the property as she pleased. It is admitted that the inam lands were enfranchised by the Government by Ex. D in the year 1891. Ex. D is granted to both Thangammal, the daughter and Kanthimathi Ammal, the widow. The material portion of the deed is as follows:

"This inam, being held for karnam service now otherwise provided for, will be subject to the payment of an annual quit rent of Rs. 11 which

Palaniyandi v. Veyilamuthu Pillai.

Kumaraswami Sastri, J.

is hereby imposed upon it in commutation both of the service and the reversionary interest possessed by the Government in the inam. The inam is now confirmed to you in freehold, in other words the inam will be your own absolute property to hold or dispose of as you think proper, subject only to the payment of the above-mentioned quit rent."

So far as Ex. D which forms the root of the title of the widow and the daughter is concerned, it is an absolute title conferred by the Government, giving them the property absolutely to hold or dispose of it as they thought proper, the only covenant being that they should pay the quit rent which the Government imposed upon the land. We think that the effect of the decision of their Lordships of the Privy Council in *Venkata Jagannadha* v. *Veerabhadrayya*[1] is clear. Their Lordships of the Privy Council dissented from the view taken in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya*,[2] which in its turn overruled the previous decisions of this Court in *Venkata* v. *Rama*[3] and *Venkatarayudu* v. *Venkataramayya*[4] and the previous cases on the subject. The effect of the decision of the Privy Council in our opinion is that Ex. D confers upon the widow and the daughter an absolute right to the property and their interests were not merely that of a Hindu widow or daughter succeeding to the property of her husband or father having only a limited right therein. Mr. Varadachari for the appellants attempts to draw a distinction and argues that the joinder of two persons as donees makes a difference as regards the construction of the grant and the interest conferred, that the point has not been touched by the decision of their Lordships of the Privy Council and that in the present case the grant being to two persons, the widow and the daughter, Courts can presume notwithstanding the decision in *Venkata Jagannadha* v. *Veerabhadrayya*[1] that the Government intended to confer an estate limited by the Hindu Law. We are unable to follow this argument. All that the Privy Council decided was that the grant by the Government conferred an estate upon widows which had no reference to any provisions of Hindu Law, that the grant has to be considered according to its own tenor and where a grant is an absolute grant it cannot be cut down by any considerations as to the status of the family and the position of the members (grantees) at the date of the grant. The fact that other donees are mentioned in our opinion

1. (1921) I.L.R. 44 M. 643: 48 I.A. 244: 41 M.L.J. 1 (P.C.).
2. (1907) I.L.R. 30 M. 434: 17 M.L.J. 101 (F.B.).
3. (1884) I.L.R. 8 M. 249 (F.B.).
4. (1891) I.L.R. 15 M. 284.

Palaniyandi v. Veyilamuthu Pillai.

Kumaraswami Sastri, J.

would not make any difference as regards the construction of the grant. This view has been taken in *Venkatasubba Rao* v. *Adinarayana Rao*,[5] where an inam title deed was in favour of five persons and a similar argument was repelled. We think that the effect of an inam title deed is tantamount to a resumption by the Government and a re-grant to the persons mentioned in the inam title deed and that what the widow got in the case was the absolute title which was the estate conferred by the grant. If it confers an absolute estate, we do not think we will be justified in cutting down the estate with reference to any other consideration. Another argument was advanced by Mr. Varadachariar, namely, that as the widow who sold the properties purported to convey only the widow's estate we must take the intention of the parties as to the estate which was intended to be granted to be regulated by the law in force at that time and that as the law after *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya*[2] was that in such cases notwithstanding the absolute terms of the inam grant the widow took only a limited estate, it was that estate which was bargained for and sold. He refers to the decision in the Kannivadi case *Abdul Aziz Khan* v. *Appayasami Naicker*[6] as supporting his contention. I do not think that these considerations apply to the present case. It is clear that what was sold by the widow and what was intended to be purchased by the vendees was the full title to the property. The consideration was fixed with reference to the passing of an absolute title. That absolute title, if the property was property held by the vendor in a limited estate which is provided for by Hindu Law in the case of widows or daughter, can only be conferred in cases of necessity which would in Hindu Law justify an alienation. For that purpose the necessity was recited in the document. But if in fact the vendor had an absolute estate granted by the Government it is difficult to see why the purchaser should not take an absolute estate because that was the estate which the vendor and the vendee agreed to pass. In the one case it would be necessary to prove facts justifying the widow in giving an absolute title and in the latter case to prove a grant giving her such title. We are clearly of the opinion that in cases where a widow or daughter has an absolute estate

---

2. (1907) I.L.R. 30 M. 434: 17 M.L.J. 101 (F.B).

5. (1925) 50 M.L.J. 46.

6. (1903) I.L.R. 27 M 131: 31 I.A. 1 (P.C).

Palaniyandi v. Veyilamuthu Pillai.

Kumaraswami Sastri, J.

and where she purports to sell the property absolutely, the purchaser is entitled to rely upon the title she had and there is no reason to cut down the estate intended to be sold by presuming that the parties intended only to have a widow's estate in spite of the fact that the sale-deed purports to be an absolute sale-deed conferring full title necessity being set out only as enabling the widow to confer such title. It is unnecessary in the view we take on these two points to consider whether the release Ex. IV was as regards the properties covered by the karnam inam, merely a release of the then existing rights claimed by the executant or the reversionary rights also. The appeal fails and is dismissed with costs. One set of costs for the contesting respondents.

Reilly, J.

Reilly, J.—I agree. In connection with Mr. Varadachariar's suggestion that the vendees in this case may have intended only to buy the interests of the widow and daughter (the sale-deed with which we are concerned, I understand, were executed by both Kanthimathi Ammal and her daughter Thangammal) it is not only to be noticed that the sale-deeds purport to convey an absolute title but that the principle that the vendees can get only the benefit of some lesser estate, which according to their appreciation or supposed appreciation of the law at the time was available for them, does not apply. From the statement given by the plaintiffs on the 4th November, 1918 it appears that all these alienations were made before 1907, that is, before the date of the Full Bench decision in *Pingala Lakshmipathi* v *Bommireddipalli Chalamayya*[2] on the basis of which Mr. Varadachariar suggests that they could have supposed only that they were buying the widow's and daughter's interests. Mr. Varadachariar suggested that that statement of the plaintiffs was not to be taken too strictly in the matter of dates because there is some indication in it that they wished to contend that some of these alienations were not real but were merely *benami* transactions by which Kanthimathi Ammal and Thangammal were to retain their interest in the property. In regard to that it is only necessary to say that it is quite clear that at the trial the suggestion was not pressed and there is no issue about it. I agree that the appeal must be dismissed with costs.

N.S. *Appeal dismissed.*

---

2. (1907) I.L.R. 30 M. 434. 17 M.L.J. 101 (F.B.).

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt.*, *Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE PAKENHAM WALSH.

The Collector of Vizagapatam .. *Referring Officer**

v.

Krishna Chandra Kharasudha Patnaik and others .. *Claim petitioners*

The President, Agency District Board, Vizagapatam and another .. *Counter-petitioners (Decree-holder and judgment-debtors).*

F. B.

The Collector of Vizagapatam *v.* Krishna Chandra Kharasudha Patnaik.

Indian Stamp Act (II of 1899), S. 2 (15) and Art 45—Applicability to the Agency tracts—Award directing partition—Stamp duty payable

The Indian Stamp Act of 1899 applies to the Agency tracts.

Chakrapani v. *Varahalamma* [(1894) I.L.R. 18 Mad 227] referred to.

An award directing partition is governed by Art. 45 in the Schedule to the Stamp Act and the stamp duty payable is the duty as on a bond for the amount of the value of a separated share or shares of the property.

Case stated under section 61 of the Indian Stamp Act II of 1899 by the Collector of Vizagapatam in his Letter R.C. No. 456-26, G-1, dated 2nd March, 1927 for declaring the stamp duty payable on an unstamped award filed in E.A. Nos. 83, 115 and 116 of 1926 in E.P. No. 9 of 1924 in O.S. No. 15 of 1923 on the file of the Agency Additional District Judge of Vizagapatam.

The Government Pleader for the Government.

B. Satyanarayana for 2nd respondent (judgment-debtor).

The judgment of the Court was delivered by

Ramesam, J.

Ramesam, J.—The first question arising in this reference is whether the Indian Stamp Act of 1899 applies to the Agency tracts. The Act itself purports to apply to the whole of British India and there is no doubt that "British India" includes the Agency tracts of Vizagapatam District. *See* section 3 (7) of the General Clauses Act (X of 1897). The argument before the Additional District Judge of the Agency seems to be that, because there was no notification under the Scheduled Districts Act (XIV of 1874), S. 3, therefore, the Stamp Act does not apply to the Agency tracts. But this argument seems to rest on a

---

*Ref Case No. 10 of 1927. 2nd August, 1928.

F. B.

The Collector of Vizagapatam v. Krishna Chandra Kharasudha Patnaik.

Ramesam, J.

misunderstanding of the object and scope of the Scheduled Districts Act of 1874. The object of that Act was to remove doubts regarding the applicability of Acts of the Indian Legislatures prior to that date and they were sought to be removed generally by the Laws Local Extent Act and secondly, by notifications either under section 3 (*a*) or 3 (*b*) of the Act, either declaring certain Acts to be in force or declaring certain Acts not to be in force. But the Scheduled Districts Act does not apply to Acts of the Indian Legislature passed after that Act which are very clear as to the local extent. The practice since 1874 has been for an Act to say that the Act applies to the whole of British India or it applies to the whole of British India excluding the Scheduled Districts, as the case may be. There are examples of several Acts in which the Acts are said to apply to the whole of British India excepting the Scheduled Districts, for example, the Specific Relief Act, 1877 and the Provincial Insolvency Act. In the case of the Stamp Act it extends to the whole of British India and there is no doubt as to its applicability to the Agency tracts. The decision in *Chakrapani* v. *Varahalamma*[1] also makes this point clear.

The second question arising in this reference is what is the stamp duty payable on the award before us. The Stamp Act, section 2 (15) defines an instrument of partition as including an award directing a partition.

The award, therefore, in this case is governed by Art. 45 in the Schedule to the Stamp Act. The duty payable according to the second column of that Article is the stamp duty as on a bond for the amount of the value of a separated share or shares of the property. Then a note explains that the largest share remaining after the property is partitioned shall be deemed to be that from which the other shares are separated. Here the whole property dealt with by the award is divided into four shares, one of the shares being in the proportion of two to each of the other three shares. The largest share after the property is partitioned is this share which is double the value of the other shares. The value of the property being Rs. 80,000, the value of two-fifths of it which is the property from which the others' shares are deemed to be separated is Rs. 32,000 and the stamp duty payable on the award is as on a bond for Rs. 48,000, which is the value of the separated shares. Under Art. 15 the duty for a bond of Rs. 48,000 is Rs. 240. This, we hold, is the proper stamp duty payable on

1. (1894) I.L.R. 18 M. 227.

F. B

The Collector of Vizagapatam v. Krishna Chandra Kharasudha Patnaik.

Ramesam, J.

the award. Having regard to the uncertainty existing as to the law applicable to the Agency tracts, we do not think this is a proper case in which the penalty ought to be levied. The Court having acted upon this document, it is enough in the interests of justice to require the claimant who is relying on the award to pay the stamp duty itself and to give effect to the document if the document is otherwise found valid. We make no order as to costs.

N.S. *Reference answered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE SRINIVASA AIYANGAR.

Tadi Sarareddi (dead) and another .. *Appellant* (Plff. and his L.R.)*

v.

Chelamcherla Brahmayya, minor by mother and guardian Rattamma .. *Respondent (2nd Deft.).*

Sarareddi v. Brahmayya.

Damages—Assessment of—Principle—Rule of highest intermediate value between date of conversion and date of verdict—Ordinary goods of merchandise—Applicability

The defendant, as the agent of the plaintiff, unlawfully and without authority, disposed of certain jaggery belonging to the plaintiff on 22nd August, 1920. Information of this wrongful sale was given to the plaintiff on 28th August, 1920. On 28th October, 1920, the plaintiff instituted this suit to recover damages. The first Court assessed the damages on the basis of the price prevailing on the date of the plaint The Appellate Court assessed it on the basis of the price prevailing on the date when the conversion was brought to the plaintiff's knowledge, *viz*, 28th August, 1920. The plaintiff preferred a second appeal to the High Court.

Held, that jaggery being ordinary goods of merchandise and not an article of peculiar or special value, the rule of the highest intermediate value between the date of the conversion and the date of the verdict was inapplicable, but that the plaintiff should have a reasonable time after the date of his knowledge of the conversion to go into the market and purchase the requisite quantity in order that he may secure to himself the profit obtainable on a rising market, and that the damages must be assessed on the basis of the price prevailing on the 9th September, which was the next date with regard to which there was evidence of the market rate in the case, as that date would also allow the lapse of a reasonable time after the date of the plaintiff's knowledge of the conversion

In every case of assessment of damages, it is a question for the Court to determine what the proper measure is, having regard to all the circumstances, the date when the wrong is committed, the place where it is com-

---

*S.A. No. 579 of 1925. 24th January, 1928.

mitted, and the circumstances under which it is committed; there is no unalterable rule of the highest market value between the date of conversion or breach and that of the trial.

Second appeal against the decree of the Court of the Subordinate Judge of Rajahmundry in Appeal Suit No. 151 of 1924 preferred against the decree of the Court of the Additional District Munsif of Rajahmundry in Original Suit No. 31 of 1923 (O.S. No. 744 of 1920, Principal District Munsif's Court, Rajahmundry).

The facts of the case are as follows:—

The plaintiff was a tradesman and the defendant a commission agent. In March, 1920, the plaintiff sent to the defendant's godown certain quantity of jaggery for being stored and sold. The contract was that the defendant was entitled to a fixed commission on goods sold and that the expenses for carriage, rent, insurance, etc., should be borne by the plaintiff. In fact the plaintiff had paid in advance the godown charges for a period of one year. It was admitted, and it was also proved to be the trade usage, that the defendant was to sell only after receiving the necessary orders from the plaintiff. It appeared also that at a previous stage the plaintiff, having come to know that the defendant was intending to sell his goods without his orders, had warned him against pursuing such a course and obtained from him a written undertaking that he would not sell without express orders from the plaintiff. The defendant sold the goods on the 22nd August, 1920 without having obtained the necessary orders. The plaintiff came to know of the sale on the 28th August and he received payment under protest of the sale price tendered by the defendant on the 18th September. A suit to recover damages for wrongful conversion was filed on the 28th October, 1920. The trial Court found, and it was conceded in appeal, that the sale was wholly unauthorised, a plea of the defendant that he sold because the goods were deteriorating having been found against. But the difficulty arose in estimating the damages. It appeared that the price of jaggery had fluctuated in the market during the interval. It reached the highest figure on a certain date in September, subsequently went down, but the price during the whole period exceeded that which prevailed at the date of conversion. The trial Court passed a decree on the basis of the price on the date of the plaint. In appeal, however, it was held that the plaintiff was only entitled to the value as on the date when the conversion was brought to his knowledge, namely, the 28th August. The plaintiff was held to be under a duty to mitigate damages by going into the market and purchasing other similar goods. Against this the plaintiff preferred a Second Appeal.

G. Lakshmanna for appellant.

P. Somasundaram for respondent.

Sarareddi v. Brahmayya.

Srinivasa Aiyangar, J.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.—The main question in this Second Appeal bears on the correct measure of damages in a case in which the defendant, as the agent of the plaintiff, unlawfully and without authority, disposes of mercantile goods belonging to the plaintiff. It has been found by the Lower Appellate Court that the disposal of the goods by the defendant was wrongful, was without authority and that this was on the 22nd August, 1920. Information of this wrongful sale appears to have been given to the plaintiff-principal on the 28th of the same month. The Lower Appellate Court has granted damages to the plaintiff-appellant on the scale of the market value of jaggery which was the merchandise concerned on or about the 28th August. This second appeal has been filed on behalf of the plaintiff and the argument has been addressed at considerable length by Mr. Lakshmanna, the learned vakil for the appellant, that the principle on which the Lower Appellate Court assessed damages payable to the plaintiff was wrong. His contention was twofold. In the first place, he argued that in all cases of conversion, the proper measure of damages must be the highest market value in respect of the goods at any time between the date of the conversion and the date of the verdict. This is what has been referred to in Sedgwick on Damages as "the highest intermediate value." So far as it is concerned, it is impossible to accede to such a contention as the general rule applicable to all cases without distinction. The principle underlying the grant of damages is undoubtedly this; the Court will, so far as money can do it, place the plaintiff in the same position in which he would have been if the wrong charged had not been committed. It is clear that, so far as the English cases go, there has been no definite rule that has been laid down by the learned Judges. In Sedgwick's book in paragraph 508 (*a*) the following illuminating passage occurs:

> "The most important point to be gathered from the English cases seems to be that the measure of damages is regarded as very much at large and dependant upon the particular circumstances of the case, and that there is no unalterable rule of the highest market value between the date of conversion or breach and that of the trial."

Undoubtedly, if the principle governing the grant of damages is as stated above, it follows necessarily that in every case it is a question for the Court to determine what the proper measure is, having regard to all the circumstances, the date when the wrong is committed, the place where it is committed and the circumstances under which it is committed. It cannot at the same time be said that the rule of the highest intermediate value is not applicable to any case whatsoever.

There may conceivably be cases where that must be regarded as the proper measure, but the circumstances of the case are that the goods which are alleged to have been converted are ordinary goods of merchandise—jaggery, and with regard to this, there is no allegation before us and indeed there could be none that similar goods or goods of even similar quality were not obtainable or obtainable in sufficient quantity at that time and place. The rule with regard to damages applicable to cases of ordinary merchandise would undoubtedly be different to the rule applicable to articles of peculiar value, such as pictures and so on and also to such articles of special value as precious gems, pearls and so on. The goods in question having been ordinary goods of merchandise, we have to derive the proper measure of damages by the application of the principle already enunciated. Assuming then that on the 22nd there was this wrongful conversion, it follows that, as the plaintiff did not come to know of the wrongful conversion till the 28th, he could not have, by anything that he did, placed himself in a position to repair the damages done to him during the interval. The Lower Appellate Court has fixed the market value on the 28th as the proper measure of damages. Mr. Lakshmanna has contended and properly contended that, even with regard to ordinary merchandise, it is reasonable that a person like the plaintiff should have a reasonable time to go into the market and purchase the requisite quantity in order that he may secure to himself the profit obtainable on a rising market. The next date after the 28th, with regard to which we have the market rate in the evidence before us, appears to be the 9th September. The evidence is that on that date jaggery of the same quality was sold at Rs. 4-12-0 per maund. It would have been necessary for the plaintiff to raise the necessary amount for the purchase of a large quantity of jaggery to go into the market and purchase the same. We are satisfied that the time till the 9th September would be a reasonable time to allow to the plaintiff for this purpose. Taking it so, it follows, that, if the plaintiff had wanted on the 9th September, to go into the market and replace the goods that he had been wrongfully deprived of, he would have had to pay Rs. 4-12-0 per maund. His own goods have been sold, according to the findings undisputed here, at Rs. 4-7-0 per maund. The rate taken by the Lower Appellate Court for awarding damages is Rs. 4-11-3 as on the 28th. We think that, taking all the circumstances into consideration, to take the rate on the 28th would be unreasonable and that

Saraireddi v. Brahmayya.

Srinivasa Aiyangar, J.

giving the plaintiff a few more days for the purpose of making and completing his arrangements, the rate on the 9th September should be taken. It follows from this that the plaintiff would be entitled to further damages at 9 pies per maund in addition to the amount of damages already granted to the plaintiff by the Lower Appellate Court. Mr. Lakshmanna has, for the purposes of his contention, referred to the case of *Greening* v. *Wilkinson*.[1] That was a case of detainer and as pointed out by their Lordships of the Judicial Committee in *Burmah Trading Corporation Limited* v. *Mirza Mahomed Ally*,[2] the principle for the award of damages in cases of proper conversion is different to the principle applicable to cases of wrong detainer. After all, a Court can only do its best by way of fixing the amount by the grant of which it will seek to place the plaintiff, as far as money can do it, in the same position in which he would have been, had not the wrong complained of been committed. In this case there can be no doubt whatever that, in the 16 or 17 days which the plaintiff would have had before the 7th September, he would have been able to replace all the goods that had been lost to him by going into the market and purchasing the same. That, therefore, we must regard as the proper measure of damages in this case. Mr. Lakshmanna also contended that in the present case the defendant was the agent of the plaintiff and therefore in a fiduciary position. His contention apparently is that with regard to a person in a fiduciary position the rule as to damages must be different to the rule with respect to other persons or wrongdoers. It is impossible generally to agree to any such proposition. There may no doubt be, in the circumstances of the wrongdoer having been a person in a fiduciary character, room for raising certain presumptions; but no such circumstances appear in the present case and there is no room, on the facts and circumstances of the case before us, for involving any such presumption, the articles being ordinary articles of merchandise and there being no question as regards the quality or otherwise. And it is impossible in this case to say what the particular legal position of the wrong-doer was as to the amount to be awarded to the plaintiff for the loss of his property, and that alone is what we are concerned with in a case for damages for wrongful conversion. The same principle which we have adopted has been indicated and enunciated in the case of *Man-*

1. (1825) 1 C. & P. 625. 2 (1878) L.R. 5 I.A. 130.

Sarareddi v. Brahmayya. Srinivasa Aiyangar, J.

chubhai Navalchand v. *John H. Tod*[3] by Mr. Justice Farran delivering the judgment of the Court. He says at page 635:

"In the case of articles of common merchandise, the state of the market subsequent to the sale would afford the criterion by which to fix the loss."

After all in this country the damages have to be fixed not by a jury but by the Court itself and the Court can only do so, taking into consideration all the circumstances; and so doing we have arrived at the conclusion already stated. The decree, therefore, passed by the Lower Appellate Court will be modified in the manner suggested and we understand that, by so calculating, the amount that would be payable by the defendant to the plaintiff would be Rs. 501-4-0. The decree of the Lower Appellate Court will be modified accordingly. In the circumstances of the case we make no order as to costs of this Second Appeal.

N.S. *Decree modified.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE DEVADOSS AND MR. JUSTICE BEASLEY.

Veerappa Goundan and others .. *Accused** (*Nos.* 1, 2, 4, 5, 6, 8 *and* 9).

F. B. Veerappa Goundan, *In re.*

Criminal Procedure Code (V of 1898), section 307—Reference by Sessions Judge under—Permissibility—Conditions—Jurisdiction and duty of High Court in such reference—Whole case if open before High Court.

By the Full Bench:—A Sessions Judge ought not to refer a case to the High Court under S. 307, Criminal Procedure Code, unless he comes to the conclusion that the verdict of the jury was one which reasonable men could not have arrived at on the evidence before them. A mere disagreement with the jury, or a mere feeling that he would himself have come to a different conclusion will not justify the Judge in taking action under the section.

In a reference under S. 307, Criminal Procedure Code, the High Court should confine itself to the question whether the Sessions Judge's view of the verdict of the jury was justified by the evidence, and should confirm the verdict, if it is not unreasonable.

By the Division Bench:—A conviction based on the evidence of only one witness is not necessarily illegal.

Reference under section 307 of the Code of Criminal Procedure, 1898, by the Assistant Sessions Judge of the Coimbatore Division in Case No. 91 of the Calendar for 1927.

---

*Reference No. 8 of 1927. 27th January, 1928.

3. (1894) I.L.R. 20 B. 633.

F. B.

Veerappa Goundan, *In re.*

The Public Prosecutor on behalf of the Crown.

K. Kuttikrishna Menon for accused.

The Court (Phillips and Madhavan Nair, JJ.) made the following

Phillips, J.

ORDER OF REFERENCE TO A FULL BENCH. *Phillips, J.*—Fourteen persons were accused of dacoity and out of them the jury found accused 1, 2, 4, 5, 6, 8 and 9 guilty and acquitted the rest. The Assistant Sessions Judge disagreeing with the verdict of guilty has referred this case under section 307 of the Criminal Procedure Code. The Public Prosecutor opposed the reference. Mr. K. Kuttikrishna Menon, on behalf of the accused, supported it and contended that in a reference under S. 307 the whole case was open before this Court and that in the words of the section we should consider the entire evidence, and after giving due weight to the opinions of the Sessions Judge and the jury come to our own conclusion. His contention was that if on a consideration of all the evidence we differed from the opinion of the jury we were bound to acquit the accused. There is a conflict of decisions as to the exact functions of a Court to which reference under section 307 has been made.

In *Emperor* v. *Chellan* [1] it would appear that the Court was of opinion that this Court should arrive at its own judgment after giving due weight to the views taken by the Judge and the jury as to the guilt or innocence of the accused. This decision really goes little further than the words of the section itself, a major portion of the judgment being devoted to a consideration of the meaning of the word "opinion." In *The Public Prosecutor* v. *Abdul Hameed* [2] it was observed at page 587:

"As far as the case of the eight persons found guilty by the jury is concerned, the effect of the reference is to open up the whole case and to render it our duty to consider whether the evidence against each is sufficient to justify a conviction for all or any of the offences charged";

but it appears that the learned Judges held that there had been misdirection and material irregularity in the procedure. Neither of these cases, therefore, is really authority for the later decision in *Nanni Kudumban* v. *Emperor,*[3] where a Bench of this Court consisting of Schwabe, C. J. and Wallace, J., seem to consider that a reference under section 307 re-opened the case entirely. Schwabe, C. J., observed:

"I think the result is that this Court, when faced with that duty, had to make up its own mind realising of course that it has a disadvantage in

1. (1905) I.L.R. 29 M. 91. 2. (1912) I.L.R. 36 M. 585.
3. (1923) 45 M.L.J. 406.

F. B.

Veerappa Goundan, *In re.*

Phillips, J.

not having seen the witnesses, but has a freer hand than the Court of Appeal generally has; and I think that if the Court comes to the conclusion on that evidence that it should not convict if the case came before it in the capacity of a trying Judge, and in arriving at that conclusion it must give due weight to the fact that other persons have taken other views and have seen the witnesses; in such a case it is the duty of this Court to acquit the prisoner."

Wallace, J., remarks that in the case of a reference under section 307

"the question whether the verdict in the case is to be for acquittal or for conviction is entirely open to the High Court, and left open to it to decide after considering the evidence and the opinions of the Judge and the Jury. The Court is bound in no way by these opinions, any more than a Judge trying a case with assessors, though he must give due weight to the opinion of the assessors, is bound to follow their opinion. I think we are as a Court bound to decide for ourselves whether the evidence on which the Jury based their verdict of 'guilty' is in our eyes sufficient to justify such a verdict."

From these two judgments it would appear that the learned Judges thought that the case was re-opened and that no particular weight should be attached to the verdict of the Jury. A different view has prevailed in Calcutta and in *Emperor* v. *Golam Kader*[4] Greaves, J., held that a verdict of the Jury could only be set aside if it is such that the Court is constrained to feel that no reasonable man could have come to that verdict. Again in *Emperor* v. *Dhananjoy Raha*[5] the prior decisions on the point were refuted and it is observed:

"But the trend of judicial opinion has been in favour of preference of the unanimous verdict of juries on whom the duty is imposed by S. 299 to decide which view of the facts is true,"

and again

"As we have said, the view propounded in the case of *Queen* v. *Sham Bagdi* [(1873) 13 B.L.R. App. 19] still holds the ground, namely, that this Court should not interfere with a unanimous verdict of the jury unless we can say decidedly that we think that it is clearly wrong."

This view was upheld in *Emperor* v. *Har Mohan Das*[6] which appears to be the latest case in that Court and Greaves, J.'s judgment is cited and approved, although in *Mamat Ali* v. *Emperor*[7] Mukerjee, J., who was a party to *Emperor* v. *Dhananjoy Raha*[5] seems to decide the case on the evidence without specifically coming to the conclusion that the verdict was perverse. There are two recent unreported cases of this Court, Reference No. 22 of 1924 and Reference No. 11 of 1925. In

4. (1924) 28 C.W.N. 876.
5. (1923) I.L.R. 51 C. 347.
6. (1927) I.L.R. 54 C. 708.
7. (1926) 44 C.L.J. 233.

F. B.
Veerappa Goundan, *In re.*
Phillips, J.

the former case Coutts Trotter, C. J. and Madhavan Nair, J., adopted the view in *Emperor* v. *Golam Kader*[4] and observed:

"In this country the Jury system is part of the law of the land dealing with cases which the Legislature has enacted shall be tried by Jury. The country has taken that system for better or for worse,"

and on that ground adopted the view of the Calcutta High Court. In the latter case Devadoss and Waller, JJ., seems to have taken it as settled that they could not interfere unless the verdict is a perverse one. I myself think that these later views of this Court are in accordance with the law. Section 307 (3) says:

"In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinion of the Sessions Judge and the Jury acquit or convict. . . ."

The powers of an Appellate Court are defined in section 423 and clause (2) of that section is:

"Nothing herein contained shall authorize the Court to alter or reverse the verdict of a Jury unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the Jury of the law as laid down by him."

It, therefore, seems doubtful to me whether this Court is intended to be given greater powers under section 307 than it would have in an appeal from the same trial. The Jury are the ultimate judges of fact and their opinion is entitled to the utmost weight, and the mere fact that the trial Judge takes a different view does not seriously detract from the weight of the Jury's opinion. When section 307 says that due weight shall be given to the opinions of the Sessions Judge and the Jury, it must be kept in mind that the opinion of the Jury on a question of fact is entitled to the very greatest weight. It, therefore, seems to me that in a case of reference it is not within the province of this Court to examine the evidence and decide for itself whether in its opinion the evidence justifies the verdict arrived at, but it should examine the evidence to see whether upon that evidence the verdict is such as a reasonable man could give. In view of the conflict of opinion on this point and as references are constantly being made it seems desirable to refer the matter for the opinion of a Full Bench.

We, therefore, refer this case for opinion as to whether the view expressed in *Nanni Kudumban* v. *Emperor*[3] or the view expressed in Reference No. 22 of 1924 is the correct one.

3. (1923) 45 M.L.J. 406.
4. (1924) 28 C.W.N. 876.

F. B.

Veerappa Goundan, *In re.*

Madhavan Nair, J.

Madhavan Nair, J.—I agree. In deciding the case referred to the High Court under section 307 of the Code of Criminal Procedure, I think the trend of opinion in this Court has been not to interfere with the verdict of the Jury unless it is clearly and manifestly wrong. As early as 1884 (see *Queen-Empress* v. *Guruvadu*[8]) this Court stated that

"upon the decisions of this and other High Courts, we ought not to interfere upon any mere preponderance of evidence, or unless we are satisfied beyond reasonable doubt that the verdict is so distinctly against the evidence that it may be termed a perverse verdict."

This principle was cited with approval and the case was followed in Cr. Appeal No. 470 of 1892 (see *Queen-Empress* v. *Chinna Thevan*[9]). In Reference No. 12 of 1925 referred to him owing to a difference of opinion between two learned Judges Spencer, J., after referring to *Nanni Kudumban* v. *Emperor*[3] in support of the position that a duty was cast upon the High Court of examining the entire evidence and coming to a conclusion as to the effect of that evidence whilst giving due weight to the opinion of the Judge and the Jury, stated that

"ordinarily the High Court will not interfere with the verdict of the jury unless it is clearly and manifestly wrong and that this is the expression used in *Queen-Empress* v *Mania Dayal* [(1886) I.L.R. 10 Bom. 497] as to the condition that would justify the High Court convicting an accused who has not been found guilty by the jury or acquitting a person who has been found guilty by the jury."

Apparently the learned Judge was not prepared to follow *Nanni Kudumban* v. *Emperor*[3] to its fullest extent. In the case before us we are asked to interfere on the ground that the preponderance of evidence and the probabilities are in favour of the view taken by the Sessions Judge. The ground urged is supported by *Nanni Kudumban* v. *Emperor*,[3] but is clearly opposed to the principle laid down in the earlier cases and given effect to in the recent decisions of this Court. In Reference No. 22 of 1924, this Court has expressed the view that we can only set aside the verdict of a jury

"if the verdict is such that the Court is constrained to feel that no reasonable man can come to such a verdict."

Though the whole case referred is left open for consideration by the High Court under section 307 of the Code of Criminal Procedure, I think that in giving due weight to the opinion of jury that opinion should not be interfered with unless it is

3. (1923) 45 M.L.J. 406.

8. (1890) I.L.R. 13 M. 343: 2 Weir 389.

9. (1890) I.L.R. 14 M. 36: 2 Weir 390.

F. B.
Veerappa Goundan, *In re.*
Madhavan Nair, J.
Coutts Trotter, C.J

clearly and manifestly wrong. I agree for the reasons given by my learned brother that the question proposed by him may be referred to a Full Bench.

The Public Prosecutor on behalf of the Crown.

K. Kuttikrishna Menon for accused.

The opinion of the Full Bench was delivered by

The Chief Justice.—The Code of Criminal Procedure, 1898, is quite definite as to the position of the verdict of a jury in the case of an appeal from the verdict of a jury which is dealt with in Chapter XXXI. By section 418 it is enacted that

"An appeal may lie on a matter of fact as well as a matter of law, except where the trial was by jury, in which case the appeal shall lie on a matter of law only."

And the same view is emphasized by section 423 (2):

"Nothing herein contained shall authorize the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him."

The inference is that the draftsman of the Indian Statute was familiar with the English Law as laid down in *Solomon* v. *Bitton*,[10] and so far as concerned appeals meant to enact that state of things for India. It may be useful to examine that decision in reference to the state of the law as it then stood. Before the Judicature Act, applications for a new trial on the ground that the verdict of the jury was against the weight of the evidence came before a tribunal whose decision was final unless an appeal was taken to the House of Lords, and that tribunal almost invariably had as one of its members the Judge who had presided at the trial. If he was "dissatisfied with the verdict of the jury," *i.e.*, did not agree with it, he communicated that to his brother Judges and it is obvious from the reports of the day that that view of the trial Judge carried great weight with the Judges who sat with him. In 1881, when *Solomon* v. *Bitton*[10] was decided, the position was that applications for a new trial came in the first instance before a Divisional Court, one of whose members might be the trial Judge, who could express dissatisfaction with the verdict of the jury and communicate that opinion to his colleagues. But an appeal lay to the newly constituted Court of Appeal, which *ex hypothesi* could not have the trial Judge as one of its members—except of course by the accident of an intervening promotion. *Solomon* v. *Bitton*[10] was tried by Lindley, J., as he then was; the jury

10. (1881) L.R. 8 Q.B.D. 176.

returned a verdict for the plaintiff, and the application for a new trial came before a Divisional Court of three Judges, of whom Lindley, J., was one. He expressed himself as dissatisfied with the verdict; and on that among other grounds a new trial was ordered. The plaintiff appealed against that decision to the Court of Appeal, and the case came before Jessel, M. R., Brett and Cotton, L. JJ., none of whom had had any connection with the trial. They laid down the rule in these words at p. 177:

"The rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence, ought not to depend on the question whether the learned Judge who tried the action was or not dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to."

That pronouncement, made 48 years ago, has never been questioned in England, and is enshrined in an even more definite form in the Indian Statute, so far as appeals are concerned. Later judicial pronouncements have usually preferred the negative to the positive way of putting it, having regard to the fact that the onus lies upon the party who contends that the verdict of the jury should be set aside; and the task laid upon him is commonly defined as being to show "that the verdict was such as no reasonable men could have come to." Up to 1909 the English authorities of course relate to verdicts in civil cases. Appeals on the facts are now possible in England in criminal cases at the instance of the accused subject to certain safeguards. It is enacted by section 3 of 7 Edw. VII c. 23:

"A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal : . . . (*b*) with the leave of the Court of Criminal Appeal or upon the certificate of the Judge who tried him that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone. . . ."

The English decisions on this section are thus summarised in the last edition of Archbold at page 337 and I have satisfied myself that the summary is accurate.

Verdict against the weight of evidence.—In order to succeed on this ground it is necessary to show that the verdict is unreasonable or cannot be supported having regard to the evidence. It is not sufficient to show merely that the case against the appellant was a very weak one; . . . . nor is it enough that the members of the Court of Criminal Appeal feel some doubt as to the correctness of the verdict . . . . nor that the Judge of the Court of trial has given a certificate on that ground.

F. B.

Veerappa Goundan, *In re.*

Coutts Trotter, C. J.

But the Indian Act has provided for another contingency than that of appeal. It gives power to the Sessions Judge to send up a case *suo motu* to the High Court in certain circumstances. Those circumstances are defined in section 307 (1) and are that the Judge should (*a*) disagree with the verdict of the jurors or the majority of the jurors, and (*b*) be clearly of opinion that it is necessary for the ends of justice to submit the case. That seems to indicate that something more should be in the Judge's mind than a mere disagreement with the jury, or a mere feeling that he would himself have come to a different conclusion. That something more must be a conclusion that the verdict was one which reasonable men could not have arrived at on the evidence before them.

That being the duty of the Sessions Judge we have to look at sub-section (3) to ascertain what is the duty of the High Court The duty is there defined as follows:

"It (*i e*, the High Court) shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict the accused."

The wording of the sub-section is most unfortunate; it appears on the face of it to leave open the very question which has now arisen for our decision, and to leave us without real guidance upon it. Are we to take it that when the Sessions Judge submits such a case to the High Court, the whole matter is re-opened and that we are to try the case as if there had been no trial at the Sessions at all, or are we to have regard to the principle that the verdict of a jury shall not be upset unless in the opinion of the High Court it is unreasonable and involves a miscarriage of justice? A Bench of this Court consisting of Sir Walter Schwabe, C. J. and Wallace, J., took the former view following some earlier authorities in this Court. The Calcutta High Court has preponderantly inclined to the latter view. On a direction "to give due weight to the opinions of the Sessions Judge and the jury" when those opinions are in conflict, it is easy to urge that, as they cancel one another, the High Court must go into the matter *de novo*; and the use of an imponderable adjective like 'due' deprives us of an assistance which I feel that the Statute should have given us.

As has already been said, it must be supposed that the submission by the Judge involves that in his opinion the verdict of the jury was perverse or unreasonable or altogether against the weight of the evidence whichever phrase be preferred. When the case comes up to the High Court, it seems to us that

F. B.

Veerappa Goundan, *In re.*

Coutts Trotter, C. J.

we can and should, without shirking any duty imposed upon us by the statute, confine ourselves to the question "Was the Judge's view of the verdict justified by the evidence?" and if we think it was not, to confirm the verdict of the jury. The jury is clearly made primarily the tribunal to find the facts; and when they have found them in one direction or the other, it is not for us to interfere unless the verdict is unreasonable. Assuming that Sessions Judges do not act under section 307 unless that is their view of the verdict in question (and they clearly ought not to act unless it is their view), we think that the duty of the High Court is discharged when it expresses its agreement or disagreement with that view of the Sessions Judge. In this case we think that the Divisional Bench was quite entitled to take the view (as it obviously did) that there was no sufficient material before it to conclude that the learned Sessions Judge was justified in so regarding this verdict and we remit the case to the Divisional Bench with this expression of our opinion.

[On receipt of the opinion of the Full Bench the reference came on for hearing before Phillips and Madhavan Nair, JJ.]

K. Kuttikrishna Menon for accused.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The judgment of the Court was delivered by

Phillips, J.

Phillips, J.—In accordance with the opinion of the Full Bench it is necessary for us to consider the evidence not so much with a view to forming our own opinion on the facts disclosed but to seeing whether the verdict of the jury was such as could be come to by a reasonable man. We have been taken through the evidence and it is unnecessary now to discuss it in detail for we are satisfied that there was evidence upon which the jury could base their verdict. The contention that it is illegal to convict a man on the evidence of only one witness cannot be supported. It must entirely depend on the circumstances of each case and certainly there is no proposition of law which justifies such a theory. We must, therefore, reject the reference of the Assistant Sessions Judge and convict the accused 1, 2, 4, 5, 6, 8 and 9 and sentence them each to three years' rigorous imprisonment under section 395, Indian Penal Code.

A.S.V. *Reference rejected and Accused convicted.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice*, MR. JUSTICE BEASLEY AND MR. JUSTICE MADHAVAN NAIR.

The Commissioner of Income-tax, Madras .. *Referring Officer**

v.

A.L.A.R. Brothers, Devakotta .. *Assessees.*

F. B.

The Commissioner of Income-tax, Madras *v.* A. L. A. R. Brothers, Devakotta.

Income-tax Act (XI of 1922), S. 10 (2) (iii)—Borrowed capital used for a separate branch of the business—Failure of this branch of business and loss of amount—Assessment for the year following the year of loss—Interest paid on borrowed capital during the year of assessment—Deduction of.

If a person who is carrying on a banking business borrows money and invests it in a piece-goods business which is only a separate branch of his business and that business subsequently fails and the sum invested is lost, interest paid on the borrowed money during the year of assessment following the year of loss can be lawfully claimed as a deduction under S. 10 (2) (iii) of the Income-tax Act in computing the profits and gains of the banking business for the year of assessment.

Case stated under section 66 (3) of Act XI of 1922 by the Commissioner of Income-tax, Madras, referring to the High Court for its opinion, the following question, *viz.*:

"If a person who is carrying on a banking business borrows money and invests it in a separate piece-goods business and that business subsequently fails and the sum invested is lost, can interest on the borrowed money be lawfully *claimed* as a deduction under section 10 (2) (iii) in computing the profits and gains of the banking business for the year of account following the year of the loss?"

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

In pursuance of the above order I have the honour to refer the following case for the decision of the Hon'ble the Judges of the High Court.

2. The petitioners are A.L.A.R. Brothers, Devakotta, who are assessed to income-tax as an unregistered firm.

3. They have banking and other businesses at several places in this Presidency and in Burma. To each of these businesses they have allotted capital, and for each business separate sets of accounts are maintained so that the profit or loss of each business can be separately worked out.

4. They have a banking business at Madras known as the A.L.A.R. Firm. This business is almost wholly carried on with

*Ref. Case No. 19 of 1927. 19th April, 1928.

F. B.

The Commissioner of Income-tax, Madras v. A. L. A. R. Brothers, Devakotta.

borrowed capital. In the year 1910 they opened a piece-goods business at Madras under the name of Ramaswami & Co. and financed it from time to time with the money borrowed by their banking business. According to Chetti custom interest was being charged in the accounts of Ramaswami & Co. on advances made by the A.L.A.R. Firm corresponding credit being given in the accounts of the latter.

5. The piece-goods business sustained severe losses and was finally closed in 1923-24. The total losses up to that year were ascertained to be over 10 lakhs. The loss of each year was allowed in the assessment made on the petitioners in the succeeding year.

6. In the year of account 1924-25 Ramaswami & Co. made no purchases or sales and maintained no separate accounts. There were outstandings to the extent of Rs. 79,000, but most of them were irrecoverable. No active steps were taken to realise any of them. Some of the debtors were insolvents. When the business was closed in 1923-24 it was found that advances made to it by the A.L.A.R. banking firm amounted to Rs. 11,09,425 practically the whole of which was lost. In spite of such loss the sum of Rs. 11 lakhs was shown in the books of the A.L.A.R. Firm as an outstanding due to that firm, and a notional credit entry of Rs. 1,07,653 was made as representing the interest supposed to have been received from Ramaswami & Co. on such advances, though as a matter of fact Ramaswami & Co. had ceased to exist and there were no available assets of that business out of which the A.L.A.R. Firm could recover even partially the advances made by it.

7. In assessing the profits of the A.L.A.R. banking firm in the following year (1925-26) the Income-tax Officer treated this notional credit of interest, *viz.*, Rs. 1,07,653, as a business receipt in accordance with the entries in the books, and similarly allowed as business expenditure the whole of the interest on borrowed capital debited in the books. The petitioners claimed that the above sum of Rs. 1,07,653 ought to be deducted from the computed profits of the A.L.A.R. banking business as the said sum represented according to them a loss sustained by Ramaswami & Co. in the piece-goods business in the year of account. The Income-tax Officer rejected the claim on the ground that the petitioners had not carried on any business in the name of Ramaswami & Co. in the year of account and could not, therefore, have sustained any such loss in that year. An extract of the Income-tax Officer's order is appended—Exhibit A.

8. On appeal the Assistant Commissioner held that the sum of Rs. 1,07,653 had been wrongly taken into account as a receipt of the petitioner's banking business. But he held that if this receipt shown in the books was to be ignored, a proportion of

F. B.

The Commissioner of Income-tax, Madras v. A. L. A. R. Brothers, Devakotta.

the interest shown as paid on capital borrowed by the banking business should also be left out of consideration on the ground that part of the capital borrowed had not been used in any business in the year of account as it had been lost in the piece-goods business in the previous years and was, therefore, no longer available. He accordingly computed the profits of the banking business by leaving out of account the receipt of Rs. 1,07,653 and disallowing under the head of interest payments a sum bearing the same proportion to the total of such payments as the capital used and lost in the piece-goods business bore to the total borrowed capital of the banking business. The interest so disallowed amounted to Rs. 99,571. An extract of the Assistant Commissioner's order is appended —Exhibit B.

9. The petitioners applied to the Commissioner for a revision of the Assistant Commissioner's order and also for a reference to the High Court under section 66 (2) of the Income-tax Act. My predecessor refused their requests. Copies of his orders are appended—Exhibits C and D.

10. On an application under section 66 (3) of the Act the High Court passed the following order:

"That the applicants herein do file in Court the points on which they want the Commissioner of Income-tax to state a case to the High Court in a clear and concise form and serve a copy of the same on the Commissioner of Income-tax, Madras, and that after such service the said Commissioner of Income-tax, Madras, shall state a case to the High Court, Madras, on the facts which in his opinion bear upon the question, and

(2) that this application be posted for hearing after the receipt of the statement from the Commissioner of Income-tax, Madras."

11. After a discussion with me the vakil for the applicants has now formulated the following question (and I believe has filed it in Court):

"If a person who is carrying on a banking business borrows money and invests it in a separate piece-goods business and that business subsequently fails and the sum invested is lost, can interest on the borrowed money be lawfully *claimed* as a deduction under section 10 (2) (iii) in computing the profits and gains of the banking business for the year of account following the year of the loss?"

12. Section 10 (2) (iii) of the Act runs as follows:—

"In respect of capital borrowed for the purposes of the business, where the payment of interest thereon is not in any way dependent on the earning of profits, the amount of the interest paid."

As I understand this clause, it provides for an allowance out of the profits and gains of a business in the year of account of the amount of interest paid in respect of capital borrowed and utilised or employed in the business. The expression "borrowed for the purposes of the business" must, it seems to me, be taken to mean borrowed with a view to its being employed in the business and

F. B

The Commissioner of Income tax, Madras
v.
A. L. A. R. Brothers, Devakotta.

actually so employed in the year of account for the purposes of earning or producing the profits and gains of that year. In other words, what determines that a particular sum is borrowed for the purpose of the business is not the intention of the borrower at the time of the borrowing whether carried into effect or not, but the actual utilisation of the sum for producing the profits and gains of the business in the year of account.

13. The contention of the petitioners is that the whole of their borrowed capital was borrowed for the purposes of their banking business and that it was one of those purposes to finance Ramaswami & Co. My answer to that must be that the profits and gains against which this allowance is claimed are those of the year of account 1924-25 and that in that year it could not have been one of the purposes of the petitioners' business to supply funds to Ramaswami & Co. since the business done under that name had ceased to exist. The sums advanced to Ramaswami & Co had been lost and were no longer available to be employed as capital of any business that was being done by the petitioners. In my opinion, therefore, the question must be answered in the negative on the ground that the sum on which interest is claimed was not capital employed in the petitioners' business in the year of account.

M. Patanjali Sastri for Commissioner of Income-tax.

K. V. Krishnaswami Aiyar and *V. Rajagopala Aiyar* for Assessees.

The Court expressed the following

OPINION.—The assessees here are a Nattukottai Chetti firm who trade under the *vilasam* of A.L.A.R. and their primary business is the usual Nattukottai Chetti business of banking and money-lending. They also trade in other ways and under the style of Ramaswami & Co., did a considerable piece-goods business in Madras which was opened in 1910. A.L.A.R. traded almost entirely on borrowed capital. The question is whether they are entitled to deduct from their income-tax assessment interest paid on that part of the borrowed capital which they had put into Ramaswami & Co. That branch of their business was unsuccessful. It had to be closed in 1924 and it was found to have sustained a loss of Rs. 11,00,000 odd. Substantially, two points were put forward against the claim of the assessees to make the present deduction. It was said first that the business of Ramaswami & Co. was quite separate and distinct from that of A.L.A.R. and that interest paid on money devoted to the purpose of providing trading capital for Ramaswami & Co. was not a deduction that could be allowed in the assessment of A.L.A.R. For this, on the findings, we can see no warrant.

F. B.

The Commissioner of Income-tax, Madras v. A. L. A. R. Brothers, Devakotta.

There is nothing in the name; Ramaswami & Co. in effect was A.L.A.R. and the case does not seem to us to be different from that of two departments of one big store. Spencer & Co., Ltd., to take a familiar instance, carry on the business of Chemists and Druggists at one end of their buildings and that of haberdashers at the other end, and for all I know they may for their own purpose keep the accounts of these two branches of their activities separate. It is obviously important for a modern multiple store like Whiteleys or Herrods or Spencers here to know how each branch of their business is doing, whether it is making a profit or a loss, so that, if one particular activity is shown to be carried on at a loss, it would be open to them to close down that branch of their general business. Nor does it seem to matter that the piece-goods business conducted under the name of Ramaswami & Co. was carried on in a separate building in another part of Madras. In our opinion the findings preclude any inference that these were two separate and distinct businesses.

The second point taken was that, as the piece-goods business had been shut down in the year 1924, and did not function in the year of assessment, 1924-25, it cannot be said that the capital which had been borrowed was employed in the business during the year of assessment. The money was borrowed for the purposes of business and was employed in the business for its purposes until it was lost. Nevertheless interest had to be paid on it and the test seems to us to be not whether it continued to be available for the purposes of the business during the year of assessment, but whether it was in its origin money borrowed as capital for the assessees' business and whether interest was in fact paid on that borrowed capital (existing or lost) during the year of assessment. We, therefore, answer the question propounded in the affirmative, safeguarding ourselves by saying that the word 'separate' in the question framed is perhaps an unfortunate ambiguity, and on the facts of this case means no more than that the business was carried on by A.L.A.R. in separate departments of which the unfortunate piece-goods department conducted under the style of Ramaswami & Co. was one. Costs fixed at Rs. 250 will be paid to the assessees by the Commissioner of Income-tax.

N. S. *Reference answered in favour of the assessees.*

Endowment Board jurisdiction where the public nature of the temple is disputed or where there is no temple within the definition of the word 'temple' in section 9 (12).

Sri Vythilinga Pandara Sannadhi v. Sir T. Sadasiva Aiyar.

It is also contended that even if section 7 is valid, the Religious Endowment Board is not properly constituted as there has been no notification issued by the Government as required by section 10.

By consent of parties these questions were treated as preliminary issues.

It is argued by Mr. Rangachari for the plaintiffs that Madras Act I of 1925 is not a valid Act as it was not passed in accordance with the provisions of the Government of India Act of 1919 and that it was not competent for the local Legislature to validate the act or acts done under that Act by any subsequent enactment as it would virtually be doing indirectly what the law prohibits to be done directly. For the purpose of this argument I shall assume that Madras Act I of 1925 was invalid and it is, therefore, not necessary for me to discuss the various reasons given in the plaints and the question is, where an Act of a Subordinate Legislature is invalid owing to the non-compliance of certain conditions required by an Act of Parliament which constitutes the Subordinate Legislature, whether the passing of a fresh enactment which complies with the requirements of the Imperial Act and which is validly passed and which validates acts done or Boards appointed under the provisions of the Act would be *ultra vires* of the Legislature and invalid.

There can be little doubt that a Subordinate Legislature constituted by an Imperial Act of Parliament is, so far as matters within its competence are concerned, supreme. I need only refer to the following observations of their Lordships of the Privy Council in *Empress* v. *Burah*[1]:

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers. But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament, but has, and was intended to have, plenary powers of legislation as large, and of the same nature, as those of Parliament itself."

So far as legislation regarding religious endowments is concerned, it clearly falls within the powers of the Madras Legislature and it is not disputed that Madras Act II of 1927

1. (1878) I.L.R. 4 C. 172 at 180 : L.R. 5 I.A. 178 (P.C.).

Sri Vythilinga Pandara Sannadhi v. Sir T. Sadasiva Aiyar.

has been validly passed. Section 7 is the only section to which objection is taken.

The only question is whether the Legislature can validate acts done under a former enactment which owing to its not complying with certain requirements of the Government of India Act is invalid.

It is not disputed that if the Religious Endowment Board was constituted without any legislative authority by the Local Government and was for that reason incompetent to exercise its functions, any subsequent legislation can validate the constitution of the Board as from the date of its constitution by the Government. It is also clear that the subjects dealt with by Act II of 1927 are subjects which the local Legislature is competent to deal with. I do not think the mere fact that there was a prior ineffectual attempt to legislate would take away from the Legislature the power to pass a subsequent enactment relating to the same subject-matter and to validate acts done or bodies constituted under the prior enactment.

In *Trustees of the Ottawa Roman Catholic Separate Schools v. The Quebec Bank*,[2] the Legislature of Ontario purported to authorise the appointment of Commissioners to take over the management of certain Roman Catholic Schools. Commissioners were appointed and they carried out their duties and for the purposes of the schools drew and expended money standing to the credit of the trustees of the Roman Catholic Schools. Then the Statute 5, Geo. V c. 45 under which they acted was declared by the Privy Council to be invalid. Thereupon the Legislature of Ontario passed 7 Geo. V c. 60 declaring that the expenditure incurred by the Commissioners under the invalid Legislature must be deemed to have been made for at the request of the trustees for the Roman Catholic Schools. The question was raised as to the validity of 7 Geo. V c. 60 and it was held by their Lordships of the Privy Council that the Act was not invalid. Lord Dunedin observed as follows:

"The claim against the Quebec Bank would be obviously good at common law. The bank was the debtor of the appellants, and it would be no defence to say that they had paid the money to a Commission whose authority was based on an Act of the Provincial Legislature which had been declared to be *ultra vires*. The real defence to the action lies in the latter statute quoted above. It is equally clear that this statute by its terms provides a complete defence. The only real question is, therefore, whether that statute also is *ultra vires*. It can only so be held if it contravenes the

---

2. (1920) A.C. 230.

exception to S. 93, sub-section (1) of the British North America Act, or, in other words, if it prejudicially affects a right or privilege of the appellants For indubitably in other respects it is a measure dealing with civil rights and as such within the domain of the provincial legislature."

Sri Vythilinga Pandara Sannadhi v. Sir T. Sadasiva Aiyar.

After pointing out that the Act does not offend against S. 93, sub-section (1), their Lordships of the Privy Council held that the statute 7, Geo. V c. 60 was not *ultra vires*.

In the present case it cannot be said that Act II of 1927 offends against any of the provisions of the Government of India Act or legislates on matters not within the competence of the local Legislature. It is difficult to see why the observations of their Lordships of the Privy Council would not apply equally to the facts of the present case.

Colonial Sugar Refining Company, Limited v. *Irving*[3] is also a case in point. In that case certain duties on sugar were levied under an erroneous impression that the fact that the Minister had moved a resolution for the levy of such duties was a valid ground for the imposition. An Act was subsequently passed which authorised the levy of the duty as from the date on which they were begun to be levied. It was held by their Lordships of the Privy Council that the Act was within the competence of the local Legislature and validated the previous levy. Their Lordships observed:

"Between October 8, 1901, and July 26, 1902, the respondent demanded from the appellants in respect of 6,700 tons of sugar produced in Queensland, sums amounting in the aggregate to £20,100 as duty imposed on manufactured sugar, in accordance with the resolution. The appellants disputed their liability and deposited the amount in accordance with statutory provisions for that purpose. It is unnecessary now to discuss whether the payment of the duty could have been enforced before the passing of the Excise Tariff, 1902, and it is not now disputed that the appellants are liable for the duty if the Act imposing the duty as from October 8, 1901 was within the powers of the Parliament."

This case is clear authority for the view that acts done without authority and which, therefore, would be invalid can be validated by subsequent legislation if the legislation is within the ambit of the powers of the Legislature.

This is not a case where an enactment which is invalid in law as not complying with certain provisions of the Government of India Act has been declared to be valid. On the contrary that enactment is expressly repealed and all that section 7 does is to validate Acts done under that enactment. As I pointed out be-

3. (1906) A. C. 360.

Sri Vythilinga Pandara Sannadhi v. Sir T. Sadasiva Aiyar.

fore, the legislation was on matters within the competence of the Madras Legislature and if no previous Act had been passed and, the Board constituted without legislative sanction was invalid, for want of legislative sanction, there was nothing to prevent, the Legislature from passing an Act validating the constitution of the Board as from the date when it came into existence. All that section 7 does is to validate certain Acts done and this I think is within the competence of the Legislature. To hold otherwise would mean that where a previous legislation has been infructuous owing to the non-compliance with certain requirements imposed by the Government of India Act, the Legislature would have no power by a subsequent enactment to validate Acts done *bona fide* under the previous enactment, or even to legislate on the same matter. No authority has been cited by Mr. Rangachari for this broad proposition. He has referred to Broom's Legal Maxims, p. 375. It is no doubt a general maxim that you cannot do indirectly what the law prohibits to be done directly. But I do not see how by enacting section 7 of Act II of 1927 there has been any evasion of the law or any indirect getting over the provisions of the Government of India Act.

It is also argued that as the previous Act was invalid, it is only the Imperial Parliament that could validate Acts done under it and reference was made to Keith's Responsible Government in the Dominions, Vol. III, p. 1325. I do not see anything in the passage referred to in the Keith's book which states that it is only the Imperial Parliament that can validate Acts done in pursuance of an enactment of a subordinate legislature which is invalid. The fact that the Imperial Parliament passed Acts to validate certain enactments of Colonial Legislatures which were invalid cannot prevent the validation of Acts done in pursuance of invalid Acts passed by the subordinate legislature assuming that the Acts which it validates are Acts which could be legislated upon by it.

I am of opinion that section 7 of the Madras Act II of 1927 was validly enacted by the local Legislature.

As regards the argument that there is no valid Board constituted owing to the want of notification under section 10, I think that section 24 of the General Clauses Act applies to the present case. If section 7 is valid, a fresh notification is not necessary as the notification already issued would be valid. The mere fact that section 10 states that the Local Government may

Sri Vythilinga Pandara Sannadhi v. Sir T. Sadasiva Aiyar.

by notification direct the constitution of a Board does not make it obligatory on the Government to do so where there is a prior valid notification. All that section 10 does is to enable Government to issue a fresh notification after cancelling the old one.

The next question is as regards section 84. Section 84 runs as follows:—

(1) If any dispute arises as to whether a math or temple is one to which this Act applies or as to whether a temple is an excepted temple, such dispute shall be decided by the Board.

(2) A trustee affected by a decision under sub-section (1) may within one year apply to the Court to modify or set aside such decision, but, subject to the result of such application, the order of the Board shall be final.

I am of opinion that it is within the competence of the Board to determine whether a math or temple is a public institution where the trustee or Matathipathi alleges that it is a private endowment or temple not falling within the Act.

Section 2 of the Act is general. It says that the Act extends to the whole of the Presidency of Madras except the Presidency Town and applies, save as hereinafter provided, to all Hindu public religious endowments.

Section 3, clause (*a*) gives the Local Government power, after consulting the Board, to exempt any such endowment from the operation of all or any of the provisions of the Act, or vary, alter or cancel such exemption.

Section 4 enacts that nothing in this Act shall apply to any math or temple whose average annual gross income including income from endowments connected therewith for a period of five years immediately preceding the commencement of this Act was less than Rs. 500 in the case of maths and Rs. 250 in the case of temples. But even in such cases the Local Government has power to issue a notification declaring that all or any of the provisions of the Act shall apply to such math or temple.

Section 9, clause (7) defines math as an institution for the promotion of the Hindu religion presided over by a person whose duty is to engage himself in spiritual service or who exercises or claims to exercise spiritual headship over a body of disciples and succession to whose office devolves in accordance with the directions of the founder of the institution or is regulated by usage; and includes places of religious worship other than a temple or places of religious institution which are appurtenant to such institution.

Temple is defined as meaning a place, by whatever designation known, used as a place of public religious worship and

Sri Vythilinga Pandara Sannadhi v. Sir T. Sadasiva Aiyar.

dedicated to, or for the benefit of, or used as of right by, the Hindu community, or any section thereof, as a place of religious worship.

Section 2 being general and applying to all Hindu public religious endowments except such as are excluded by the provisions of the Act, it seems to me to be clear that, where a question arises between a Matathipathi or Dharmakartha on one side and the Board on the other as to whether the Religious Endowment Board has jurisdiction, section 84 gives the Board power to determine that question subject to the right of the trustee under clause 2 to apply to the Court to modify or set aside the decision of the Board.

It is contended by Mr. Rangachari that before the Board can assume jurisdiction the institution or temple must be one which does not fall within the exceptions stated above and that where that question itself is in dispute, the Board would have no authority to act under the Act and must file a suit as otherwise the Board would really be adjudicating on a matter in which it is a party.

Section 84 is general and says that if any dispute arises as to whether a math or temple is one to which the Act applies or as to whether a temple is an excepted temple, it is the Board that shall settle the dispute.

Section 84 does not make any exception as to the class of disputes that give the Board competence to decide matters in issue.

Where, however, there is no temple in existence as a place of public worship when the Act came into force, it is difficult to see how section 84 can give any power to the Board to call upon the trustees to account for the endowed properties or direct them to rebuild the temple or to apply the income in a particular manner.

Section 9, clause (12) clearly contemplates a temple in actual existence as a place of public worship. There is nothing in the Act or in section 84 which says that the trustees shall have jurisdiction to decide the way in which the income of the particular endowments attached to temples which before the Act came into force ceased to exist as places of public worship is to be applied. That is a function which ordinarily belongs to Civil Courts.

So far as Suit No. 424 of 1926 is concerned, it is not disputed that all that remains are the ruins of a temple which fell into ruins or was demolished several years ago. The report

filed (Ex. A) as to which there is no dispute makes this clear. It is no doubt true that certain properties are described as Devaswom properties and probably their income was used by the members of the Tarwad at least in part for the performance of worship in the temple. But I do not think the fact that there are some properties attached, the income of which should be devoted to the temple, would give the Board jurisdiction either to direct the restoration of the temple or to invoke the doctrine of *cypres* for the purpose of dealing with the income.

So far as C.S. No. 424 of 1926 is concerned, there must be a decree in favour of the plaintiff declaring that the Act does not apply to the Kottamalai properties and that the Board has no jurisdiction to interfere in the matter. An injunction will issue restraining the Board from exercising any of the powers conferred on the Board by the Act with reference to the temple or interfere with the plaintiffs' management and enjoyment of the properties. The Board will pay the plaintiffs one-half costs of the suit.

As regards the other suits, I decide the preliminary issues against the plaintiffs. It will be declared that section 7 of Act II of 1927 is not *ultra vires* but was within the competence of the Legislature and that the Board as at present constituted has power and jurisdiction to act under the Act. As the suits have been posted for hearing to-day on the other issues I shall proceed to dispose of the other issues.

Mr. Rangachariar says he does not press the other issues in C.S. No. 574. It is dismissed with costs. In C.S. Nos. 168, 170 and 412 it is argued by plaintiffs' vakil that a right of suit still remains to plaintiffs even though the Board has held the temples to be public temples as that right is not taken away by the new Act, which only validates acts done under the old Act. I have held that the acts of the defendants under the old Act have been validated and that the Board has the power to decide under section 84 corresponding to section 80 of the old Act whether a temple is public or private. Having regard to the frame of the present suits I do not see how an injunction can issue having regard to sections 7 and 84 of this Act. Assuming without deciding that a suit would lie for setting aside the Board's decision that the temple is a public temple, such a suit would only lie in the Court where the temple is situate. As regards C.S. No. 169 it is argued that the Board has not decided the question that the temple was public. It is stated that the Board by its letter

Sri Vythilinga Pandara Sannadhi v. Sir T. Sadasiva Aiyar.

dated 20th November 1925 stated that having regard to the decision in *Muthiah Chetty* v. *Periannan Chetty*[4] the present temple is a public temple as it was similarly situated. If this order is not an order declaring the temple to be public after due enquiry, then the matter must be deemed to be still pending and the Board can enquire into the matter under section 84 and pass final orders. I do not see how I can grant the prayers in the plaint which are confined to declaring the Act to be invalid and for an injunction restraining the defendants from acting. In C.S. No. 64 of 1927 it is argued that no enquiry was held under section 84 and the vakil wants an enquiry. The Board on the allegations of the plaintiff that 50 illams were interested in the temple held it was a public temple. I do not think I have any jurisdiction to go into the matter of the temple situated in Malabar being a public or private temple. The plaintiffs ought to have filed a suit in Court having the jurisdiction as regard the temple. As a temple belonging to several families may still be private if it originally belonged to one family which in course of time became divided into several branches. I think the Board will save expenses and litigation if they would rehear the matter and decide on the evidence plaintiff may adduce.

As regards No. 624 Mr. Ramachandra Aiyar wants an adjournment. I see no grounds to grant further time. The parties ought to have been ready. The case was on board several times and when I disposed of the preliminary issues on the 1st August I intimated my decision but the parties said they wanted time to consider. I said I would give judgment later on to enable them to be ready to go on with the other issues if they pressed them. I think the plaintiff had ample time. As regards No. 372 of 1926 the plaintiff wants to raise an additional issue as to allegations in para. 10 as to a treaty with the Government. No summons has been taken out for an additional issue. I see no grounds to raise any additional issue at this stage. No application was made even when the case was taken up on the 1st August.

Suits Nos. 390, 409, 384, 248, 383, 372, 168, 412, 169, 170 and 338 of 1926, 64 of 1927, 574 and 624 of 1925 will be dismissed with costs.

In No. 125 of 1926 the plaintiff is reported dead two months ago. This will be adjourned for 6 weeks. Plaintiff's vakil withdraws No. 295 of 1926. It is dismissed with costs. C.S.

4. (1916) 4 L. W. 228.

No. 208 of 1927 and O.P. No. 65 of 1927 on the file of the District Court of Tanjore which is C.S. No. 89 of 1928 will be adjourned one month as application for commission is pending.

N.S. *Suits decided.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—LORD PHILLIMORE, LORD BLANESBURGH AND MR. AMEER ALI.

Hitendra Singh, since deceased (now represented by Jagdish Nandan Singh) and others.. *Appellants** (*Plffs.*)

v.

Maharajadhiraj Sir Rameshwar Singh Bahadur and another .. *Respondents* (*Defts.*).

Hindu Law—Husband—Transfer to wife by—Estate conveyed—Mithila Law—Gift pure and simple—Transfer for consideration—Distinction.

Under the Mithila Law, a simple and pure gift by the husband to the wife does not convey to her absolute ownership. She takes it only for her life without any right of alienation unless power of alienation is expressly conferred on her. The limitation thus imposed by that law applies exclusively to pure and simple gifts, and not to a gift for consideration.

Hindu Law—Husband—Transfer to wife by—Deed of—Construction—Gift pure and simple or transfer for consideration—Estate conveyed.

Held, on the construction of a *hiba-bil-ewaz* executed by a Mithila Brahmin governed by the Mithila Law in favour of his wife, that it was not a gift pure and simple, but was a transfer for consideration and for substantial consideration, and that by it all the rights of ownership were actually conveyed to the wife.

Mahomedan Law—Hiba-bil-ewaz—*Transfer by way of—Nature of.*

Under the Mahomedan Law, a transfer by way of a *hiba-bil-ewaz* is treated as a sale and not as a gift.

Appeal No. 86 of 1926 from a judgment and decree of the High Court, Patna, dated the 16th February, 1925, which affirmed a decree of the Court of the District Judge of Darbhanga, dated the 12th November, 1923, dismissing the appellants' suit.

From the decree of the District Judge dismissing their suit the plaintiffs appealed to the High Court of Judicature at Patna. The appeal was heard by Mr. Justice Das and Mr. Justice Foster, who delivered dissenting judgments on the 19th December, 1924.

---

*P. C. Appeal No. 86 of 1926. 8th March, 1928.

P. C.
Hitendra Singh v. Sir Rameshwar Singh Bahadur.

In consequence of the difference of opinion between the two learned Judges the case was referred to the learned Chief Justice (Sir Dawson Miller), who, on the 27th January, 1925, delivered his judgment, by which he agreed with Mr. Justice Foster.

In accordance with the judgment of Sir Dawson Miller a decree was passed by the Original Bench (Das and Foster, JJ.), on the 16th February, 1925, dismissing the appeal, and from that decree the appellants preferred the present appeal to His Majesty in Council.

The judgments delivered in the High Court will be found reported at length in I.L.R. 4 Pat. 510 ; 87 I.C. 849 ; 88 I.C. 141.

Lowndes, K. C. and *McNair* for appellants.

Upjohn, K. C. and *Dube* for respondents.

8th March, 1928. Their Lordships' judgment was delivered by

Mr. Ameer Ali.

MR. AMEER ALI.—Their Lordships do not consider it necessary to call upon the respondents in this case, as the question for determination lies within a small compass and they have no doubt on the answer. The facts which have given rise to this litigation are fully stated in the judgments of the Courts in India; but a short resume is necessary to elucidate how the question has arisen in this case.

It appears that one Durga Dutt Singh, who owned 7½ annas share of the village of Laheri which he held under a babuana grant in the district of Darbhanga, found himself considerably involved in debt in 1876; and his property was threatened with sale in execution of decrees against him. In order to pay off the debt which amounted to over Rs. 41,000, he professed to transfer to his wife Aruragin Bahuasin the property in suit for a consideration of Rs. 41,532. The transaction between husband and wife is, in these proceedings, called a *hiba-bil-ewaz*, and the question for determination turns upon the construction of this document.

The debt for which the transfer was ostensibly executed was discharged with the money Durga Dutt Singh obtained under it. Their Lordships purposely use the word "ostensibly" in order to leave their decision until later in the course of the judgment.

On the 15th December, 1890, Durga Dutt Singh and his wife, the Bahuasin, executed a deed of mortgage to the Maharaja

P. C.

Hitendra Singh v. Sir Rameshwar Singh Bahadur.

Mr. Ameer Ali.

of Darbhanga, now represented by the defendant, in order to satisfy certain decrees which were in execution against them; and as security for the principal and interest mentioned in the bond, they hypothecated the same share in Taluka Laheri. This mortgage deed was signed by the second plaintiff on behalf of his mother Aruragin Bahuasin and was attested by the plaintiffs one and three.

On the 5th April, 1897, the Maharaja of Darbhanga obtained a decree for the sale of the mortgage-properties against both Durga Dutt Singh and his wife. In execution of the above decree the mortgage-properties were put up for sale on the 21st of May, 1902, and purchased by the decree-holder with the permission of the Court. The application for setting aside the sale was preferred by both Durga Dutt Singh and his wife, and various grounds were alleged. Whilst this application was pending in Court the Bahuasin died (on the 1st February, 1904), and the plaintiffs' appellants were substituted in her place.

The Subordinate Judge of Muzaffarpur, within whose jurisdiction the village in suit lay, on the 20th June, 1904, overruled the objections and confirmed the sale. His decision was affirmed on appeal by the High Court of Calcutta on the 16th June, 1906.

The present appellants had in the interval brought a suit on the 23rd February, 1906, against the defendant in the Court of the Subordinate Judge of Muzaffarpur, making Durga Dutt Singh, their father, a defendant in the suit. Various allegations were put forward in the plaint; but no ground as is now made that the Bahuasin, the plaintiffs' mother, had not a transferable estate under the deed of gift of 1876, was put forward. The appellants did not proceed with the case; they applied to the Court for permission to withdraw it on certain grounds, to which their Lordships do not consider it necessary to refer.

In spite of the objections of the defendant the Court allowed it to be withdrawn with liberty to bring a fresh suit. This order is dated 16th March, 1907.

The plaintiffs took no action in respect of the property or the transaction under which it was purported to be transferred to the lady by Durga Dutt Singh, until 1918. The present suit was brought on the 24th July of that year in the Court of the Subordinate Judge of Darbhanga.

In their plaint they allege that their mother, the Bahuasin, was the owner of 7 annas and odd shares in Taluka Laheri under the terms of the document of the 17th April, 1876, executed by

P.C.

Hitendra Singh v. Sir Rameshwar Singh Bahadur.

Mr. Ameer Ali.

their father; that the latter owed a sum of nearly two lakhs of rupees to the Maharaja of Darbhanga, and that his wife was in no respect responsible for the debt, and that "Durga Dutt Singh, taking advantage of his position of authority and influence over his wife, mortgaged the property," and that "she was induced to become a party thereunder by a misrepresentation that the husband's debts were binding on the wife."

The Subordinate Judge framed a number of issues relating to the title of the plaintiffs, and without trying the facts he held on the legal objections of the defendants that the suit was not maintainable. He accordingly dismissed the action. The case came up on appeal to the High Court of Patna, and the learned Judges being of opinion that it was necessary that the facts should be tried set aside the order of the Subordinate Judge and remanded the case for a trial on its merits.

The Subordinate Judge then took evidence and gave judgment, He held that the transfer by the husband to the wife in 1876 was a *bona fide* and not a nominal or illusory transaction. He held further that Durga Dutt Singh made over possession of the property to his wife in pursuance of the *hiba-bil-ewaz*.

One point arose in the argument before the Subordinate Judge in connection with the transfer of 1876, which it is admitted had never been previously raised in any proceeding. It related, in fact, to the point which their Lordships have to decide now, namely, whether under the *hiba-bil-ewaz*, the mother of the plaintiffs took an absolute title which entitled her to alienate the property conveyed to her. It was contended by the plaintiffs in the course of the argument that she had no right to mortgage the property in 1890. This view has been accepted by Mr. Justice Das, one of the learned Judges before whom the appeal came for hearing after the remand. Mr. Justice Das held that as Durga Dutt was a Mithila Brahmin governed by the Mithila law, the gift that he made to his wife did not convey to her an absolute title giving her the power of alienation and that, therefore, the transaction was ineffective. Mr. Justice Foster has taken a different view. On account of this difference of opinion the case went before the Chief Justice Sir Dawson Miller who has agreed with Mr. Justice Foster, and has held that on a proper construction of the document of 1876, full rights were conveyed to the Bahuasin by Durga Dutt Singh, and she had an absolute title in the property. He agreed with Mr. Justice Foster and accordingly dismissed the suit.

P. C.

Hitendra Singh v. Sir Rameshwar Singh Bahadur.

Mr. Ameer Ali.

The *hiba-bil-ewas* of April 17, 1876, begins with describing Durga Dutt Singh as the absolute proprietor of 7 annas 8 gandas of the property. It then recites that there was a decree against Durga Dutt for Rs. 41,000 odd. It was under execution in the Court of the District Judge. The debtor further states in the *hiba-bil-ewas* that he was unable to procure money for the payment of the decretal amount, and then the document proceeds as follows:—

"As a sale (of the property) will entail loss of the said two Milkiat properties on sale, belonging to me, the executant, I, of my own free-will and accord, have out of the said two mauzas on sale made a gift for consideration (*hiba-bil-ewas*) of 7 annas 8¾ gandas share, etc., together with fruit-bearing and non-fruit bearing trees, ahars, pokhars, reservoirs, tanks, pucca and kacha wells, sair, salt sairs, occupied and unoccupied houses of tenants, all zamindari rights, which I have in my possession up to this time, without participation of any one, to my wife Musammat Aruragin Bahuasin on receiving from her Rs. 41,532 as. 6 p. 8 k 16 m. 16 in cash and having paid therewith the decretal amount due to the said decree-holder got the properties released from sale and put the said Musammat in possession of the gift properties. The said Musammat should have and hold possession of the gift properties and enjoy the produce thereof generation after generation, and I, the executant and my heirs and representatives neither have nor shall have any demand or dispute with respect to the gift properties or the consideration thereof as against the said Musammat, her heirs and representatives. Should I, the executant, my heirs and representatives make any claim or put forward any demand in respect of the gift properties or the consideration thereof the same shall be deemed null and void."

Their Lordships have no doubt that it was not a gift pure and simple. Upon the findings of fact arrived at by the Courts in India the transfer was for consideration. The consideration was not illusory; it was substantial. Under the Mahomedan Law a transfer by way of a *hiba-bil-ewas* is treated as a sale and not as a gift. The limitation upon alienation imposed by the Mithila law in the case of a gift by husband to wife, applies exclusively to pure and simple gifts, and not to a gift for consideration such as in the present case. It is unnecessary in this view to refer to the decisions cited on behalf of the appellants. It may be desirable, however, to draw attention to section 8 of the Transfer of Property Act (IV of 1882), which declares as follows:—

"Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property, and in the legal incidents thereof."

P. C.

Hitendra Singh v. Sir Rameshwar Singh Bahadur.

Mr. Ameer Ali.

In *Surajmani* v. *Rabi Nath Ojha*[1] the question turned on the word "Malik" used in the transfer to the donee. This Board held that full rights of ownership were transferred to the donee in that case.

Lord Buckmaster in *Ramachandra Rao* v. *Ramachandra Rao*[2] broadly laid down the principle as follows:—

"Their Lordships do not, therefore, propose to embark upon the consideration of what the effect of the deed of gift in favour of Thulja Boyee might be correctly determined to be, but as some misapprehension appears to exist as to the effect of certain decisions of the Board, and notably *Surajmani* v. *Rabi Nath Ojha*[1] their Lordships think it desirable to remove this doubt, lest error should creep into the administration of the law in India with regard to the rights of a Hindu widow. In the case referred to, when originally heard before the High Court, it had been stated that under the Hindu law in the case of a gift of immovable property to a Hindu widow, she had no power to alienate unless such power was expressly conferred. The decision of this Board did not more than establish that that proposition was not accurate, and that it was possible by the use of words of sufficient amplitude to convey in the terms of the gift itself the fullest rights of ownership, including, of course, the power to alienate, which the High Court had thought required to be added by express declaration"

In this view of the case it is unnecessary to discuss whether the suit was barred under the Statute of Limitation, or whether it was maintainable having regard to the fact that the cancellation of the documents was not asked for in the plaint. Assuming that the plaintiffs are right in their contention, that the suit is not barred, nor are they precluded from claiming the property in suit, their Lordships are clearly of opinion that the terms of the transfer conveyed to the transferee full rights of ownership. As they understand the Mithila law a simple and pure gift by the husband to the wife does not convey to her absolute ownership. She takes it only for her life without any right of alienation unless power of alienation is expressly conferred on her. In this case it is clear that all the rights of ownership are actually conveyed to the wife. Their Lordships have no doubt either in principle or upon precedent that the Babuasin took the property in full right of ownership.

That being their Lordships' opinion, the appeal fails, and they will humbly recommend to His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants: *Watkins and Hunter.*

Solicitors for respondents: *Pugh & Co.*

K.J.R. *Appeal dismissed.*

1. (1907) L.R. 35 I.A. 17: 18 M.L.J. 7 (P.C.).
2. (1922) L.R. 49 I.A. 129: 43 M.L.J. 78 (P.C.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Vedappan Servai and others .. *Petitioners** (*Petnrs.*)

v.

M. Periannan Servai and others .. *Respondents* (*Counter-petitioners*).

Vedappan Servai *v.* Periannan Servai.

Criminal Procedure Code (*V of* 1898), *Ss.* 144 *and* 435—*Order by a Magistrate under S.* 144—*Revision to High Court—Maintainability—Effect of the amendment by the omission of clause* (3) *from S.* 435—*Government of India Act, S.* 107—*Orders under S.* 145—*Revision.*

No revision lies to the High Court against an order passed under S. 144 of the Criminal Procedure Code as the Magistrate acting under that section is not a Court. The amendment of section 435 of the Criminal Procedure Code by the omission of clause (3) from that section has not the effect of permitting a revision to the High Court from such an order, though it has the effect of permitting a revision from an order passed under S. 145

Nataraja Pillai v. *Rangaswami Pillai,* (1923) I.L.R. 47 M. 56: 44 M.L.J. 328 followed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY.

Suthadi Alaga Thevar and others .. *Petitioners*† (*Counter-petitioners*)

v.

G. A. Baker, authorised agent of Proprietors of Gandanaickanur Zamin .. *Respondent* (*Petitioner*).

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Madura in Cr.R.P. No. 1 of 1928 preferred against the Order of the Court of the Stationary 2nd Class Sub-Magistrate of Uthamapalayam in Mis. Case No. 15 of 1927.

F. S. Vas for petitioners.

K. Venkataraghava Chari for *The Public Prosecutor* on behalf of the Crown.

C. A. Seshagiri Sastri and *K. Chandrasekhara Aiyar* for respondent.

The Court made the following

ORDER.—Following *Nataraja Pillai* v. *Rangaswami Pillai* [(1923) I.L.R. 47 M. 56: 44 M.L.J. 328] and Criminal Revision Petition No. 326 of 1928 I must hold that the Sub-Magistrate's order could not be revised under section 435 of the Code of Criminal Procedure. That being so, the District Magistrate's order that the Sub-Magistrate should reconsider the matter, is not a subject for revision. This petition is dismissed.

*Cr. R. C. No. 400 of 1928. 16th May, 1928
(Cr. R. P. No. 326 of 1928).
†Cr. R. C. No. 257 of 1928. 10th August, 1928.
(Cr. R. P. No. 201 of 1928).

Vedappan Servai v. Periannan Servai.

Semble: The High Court may, in a proper case, interfere under S. 107 of the Government of India Act with an order passed by a Magistrate under S. 144 of the Criminal Procedure Code.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 12th April, 1928 of the Court of the Taluk 1st Class Magistrate of Tiruppathur (Ramnad District) in M.P. No. 145 of 1928.

Dr. Swaminathan, P. N. Marthandam Pillai and *A. Srirangachariar* for petitioners.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

K. S. Jayarama Aiyar and *K. S. Venkatarama Aiyar* for respondents.

The Court made the following

ORDER.—This is a revision petition filed against the order of the Taluk First Class Magistrate of Tiruppathur, dated 12th April, 1928 under section 144 of the Criminal Procedure Code. A preliminary objection is taken by the learned vakil for the respondent that this petition does not lie. He argues that the High Court acting under section 435 of the Criminal Procedure Code can call for and examine the record of any proceeding only before any inferior Criminal Court and that, in the present case, the order of the Magistrate acting under section 144 is not the order of a Court. In support of this argument he relies on the case reported in *Nataraja Pillai* v. *Rangaswami Pillai*[1] which was a judgment of Ayling, J. and myself. That decision was passed prior to the amendment of S. 435 by the omission of clause (3). It is true that Mr. Ranganadha Aiyar in his Criminal Procedure Code expresses the opinion that the decision in *Nataraja Pillai* v. *Rangaswami Pillai*[1] is no longer law on account of the amendment, but the correctness of this opinion is questioned by the learned vakil for the respondent and I have to consider the point.

It is true that, so far as section 145 of the Code is concerned, the omission of clause (3) of section 435 permits a revision to the High Court. But it is clear that, but for clause (3), an order under section 145 is an order by a Court operating between the two contending parties. The words "to attend his Court in person" in section 145 clearly show that the Magistrate acting under section 145 is a Court; but the old clause (3) of S. 435

1. (1923) I.L.R. 47 M 56: 44 M.L.J. 328.

Vedappan Servai v. Periannan Servai.

laid down that it is not a proceeding within the meaning of section 435. Now that the clause is omitted the section certainly operates.

Now, are the consequences exactly the same in the case of section 144? At first sight one may think it is so; but it seems to me that as to section 144, clause (3), section 435 was somewhat redundant and only made matters clear. Even without it, it is doubtful whether section 435 applies. There is nothing in section 144 to indicate that the Magistrate acting under that section is a Court as in the case of section 145. Dr. Swaminathan, appearing for the petitioner, argues that the decision in *Nataraja Pillai* v. *Rangaswami Pillai*[1] purports to follow the Full Bench decision in *Sundram* v. *The Queen*[2] and another Full Bench decision in *Abbas Ali Chowdhry* v. *Illim Meah*,[4] that the Madras case was decided on the Code of 1872 and the Calcutta case was on the Code of 1861. Section 518 of the Code of 1872 corresponds to section 144 of the present Code and section 520 of that Code corresponds to clause (3) of section 435 and he argues that section 520 was not referred to in *Ponnuswami* v. *The Queen*[2] and now that section 435 (3) is omitted the decision does not apply; but it seems to me that Ayling, J. and myself carefully considered the fact that those decisions were on the earlier Codes and we observed:

"We find nothing in the changes which would render less applicable the considered opinions of the learned Judges in that case."

I am not convinced by this argument of Dr. Swaminathan.

Another argument urged by him is that, under section 6 of the Code, the Criminal Courts in British India are divided into five groups and the 3rd, 4th and 5th groups are Magistrates of the first, second and third classes, but this does not mean that a Magistrate is always a Court whatever he is doing. The section only means that among the Criminal Courts in British India are Magistrates but this does not necessarily mean that the Magistrates are always Courts. It can only mean that when they act judicially they are Criminal Courts. Section 6 is not inconsistent with the idea that Magistrates may sometimes act in executive and administrative capacity and not as a Court. It is unnecessary to refer to cases prior to *Nataraja Pillai* v. *Rangaswami Pillai*.[1] The decision of the Privy Council in

1. (1923) I.L.R. 47 M. 56: 44 M.L.J. 328.
2. (1883) I.L.R. 6 M. 203 (F.B.).
3. (1870) 14 W.R. (Cr.) 46.

Vedappan Servai v. Periannan Servai.

Clarke v. *Brojendra Kishore Roy Chowdhry*[4] does not help the petitioner. It only shows that in some parts of the Code the words—Courts and Magistrates—are used interchangeably and that under section 96 a Magistrate issuing search warrants was acting as a Court; but this does not conclude the matter as to section 144. Some of the decisions brought to my notice are decisions in which no objection was raised and the point was not considered and, therefore, they are of no value. A decision of the Patna High Court *Dhanraj Bhagat* v. *Bharat Narain Singh*[5] is also relied on. There also this point has not been considered, but I am not able to follow the reasoning of that judgment. It is said that the final order under section 144 was passed without any preliminary notice to the petitioner. No preliminary notice is necessary. The only argument that suggests itself to me against the view I am now taking is this: cases occasionally arise in which the powers under section 144 are abused by Magistrates. Sometimes orders are passed under section 144 repeatedly, that is, as each order expires by the lapse of two months a further order is made for a like period and so on. It has been observed that such a procedure is an abuse of powers given under the Code and ought to be set aside. The question arises how is an order to be set aside where it is an abuse of the power conferred by the Code. I can only say that probably in such cases the power under section 107 of the Government of India Act will have to be invoked. Anyhow I do not see enough reasons to doubt the correctness of the decision in *Nataraja Pillai* v. *Rangaswami Pillai*[1] and until doubt is thrown upon it by more authoritative decision, I am bound to follow it. I hold that no revision lies in this case and the revision petition is dismissed.

N.S. ——— *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Muhammad Salia Rowther and others .. *Petitioners* in both (Accused in both).*

Muhammad Salia Rowther, *In re.*

Criminal trial—Documents written by accused filed along with his statement—Duty of Criminal Court to consider.

*Cr.R.C. Nos. 1027 and 1928 of 1927. 20th April, 1928.
Cr.R.P. Nos. 924 and 925 of 1927.

1. (1923) I.L.R. 47 M. 56: 44 M.L.J. 328.

4. (1912) L.R. 39 I.A. 163: I.L.R. 39 C. 953: 23 M.L.J. 32 (P.C.).

5. (1924) 84 I.C. 324.

Muhammad Salla Rowther, *In re.*

Where a document is written by the accused, whether it be a letter or any other document, it is open to the accused to file it in Court along with his statement and a Criminal Court is not justified in brushing aside such document but is bound to consider it along with his statement, although there is no witness to speak to the actual writing of the document.

Petitions under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of Session of Madura Division in Criminal Appeals Nos. 82 and 81 of 1927 preferred against the judgments of the Court of the Sub-divisional Magistrate of Melur Division in C.C. Nos. 8 and 34 of 1927 and in C.C. Nos. 9 and 33 of 1927 respectively.

F. S. Vas for petitioners.

P. Govinda Menon for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—Several points are urged by Mr. Vaz in this case and the only point that needs consideration is whether the Magistrate who tried the case was justified in overlooking certain documents filed by the defence at the close of the case. One of them is a telegram purported to have been sent by the 1st accused to the 2nd accused on 1st April, 1926. Another is a receipt for 12 annas for the cost of the telegram. The third is the post card said to have been written by the 2nd accused to the 1st accused in reply to the telegram on the 1st April, 1926 from Madura and the fourth is a railway ticket from Egmore to Madura, dated 4th April, 1926. These documents were put in along with the statement of the accused. The Magistrate remarked:

"These records have not been put in through proper channel. Nor have they been subjected to cross-examination. And, therefore, I refrain from commenting upon these unproved records as they have not been exhibited in this case."

Where a document is written by the accused, whether it be a letter or any other document, it is open to the accused to file it in Court along with his statement. It may be that there is no witness to speak to the actual writing of the document; but the Court is bound to consider the document along with his statement. It may be that the statement of the accused is not true, but in order to see whether the documents are relevant or irrelevant, the Court must look into them, see what they purport to be and then consider the statement of the accused that he wrote them, or that he sent them or that he received them and

Muhammad Salla Rowther, *In re.*

then decide the case. It is not open to a Criminal Court to shut its eyes to the statement of the accused when that statement refers to certain documents to which the accused is a party. Under the law the Court is bound to consider the statement of the accused. The Court may not be satisfied with the statement of the accused and may require further proof and if further proof is not forthcoming, it may decline to act on it. But no Criminal Court is justified in brushing aside the documents to which the accused are parties when the accused themselves file those documents in Court along with their statements. As the accused cannot give evidence on oath, they can only file a statement or refer to some documents to which they have been parties. I think this action of the Magistrate has vitiated the trial of the case. Mr. Govinda Menon for the Public Prosecutor contends firstly that these documents do not relate to the date of the occurrence, and secondly at best they can only refer to the case of 1st accused. The prosecution case is that it was the 1st accused who engineered the whole thing, and at his instance the rioting was committed. It is open to the jury to come to the conclusion that the case against one of the accused is false and consequently that it could not rely upon the prosecution evidence as regards the rest of the accused. That is a matter entirely for the jury and it cannot be said that the Judge would only disbelieve the case of the prosecution so far as the 1st accused is concerned and not with regard to the rest. I set aside the conviction in this case and order a re-trial. The District Magistrate will forward the records to any Magistrate other than the Magistrate who tried the case.

N.S. *Conviction set aside and re-trial ordered.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY.

Muthukaruppa Servai .. *Petitioner** (*Accused*).

Muthukaruppa Servai *In re*

Criminal trial—Irregularity—Illegality—Accused—Pleader of—Arguments of—Refusal to hear.

An accused person has a right to be heard through the pleader who defends him and a denial of that right is not a mere irregularity.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the

---

*Cr.R.C. No. 295 of 1928. 23rd August, 1928.
Cr.R.P. No. 236 of 1928.

judgment of the Court of the Sub-divisional Magistrate of Mayavaram in Criminal Appeal No. 10 of 1928 preferred against the judgment of the Court of the Stationary Sub-Magistrate of Mayavaram in Calendar Case No. 401 of 1927. Muthukaruppa Serval, *In re.*

K. N. Ganapathi for petitioner.

K. S. Vasudevan for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—It is alleged by the petitioner, and his allegation is supported by the pleaders who appeared before the Sub-Magistrate and is not denied by the Public Prosecutor, that, when at the conclusion of the evidence the petitioner's pleader wished to argue the case for his client, the Sub-Magistrate refused to hear him.

The petitioner had a right to be heard through the pleader who was defending him, and the Magistrate's denial of that right to him cannot be regarded as a mere irregularity, as is suggested for the Public Prosecutor.

The conviction and sentence are set aside. The case will be re-tried by such Magistrate as the District Magistrate directs.

The petitioner will remain on bail as at present.

A.S.V. *Conviction and sentence set aside and re-trial ordered.*

PRIVY COUNCIL.

[On appeal from the Supreme Court of Hong Kong.]

PRESENT:—LORD BUCKMASTER, LORD BLANESBURGH AND LORD DARLING.

The Hong Kong and Shanghai Banking Corporation .. *Appellants** (*Defts.*)

v.

Lo Lee Shi .. *Respondent* (*Plff.*).

P. C. Hong Kong and Shanghai Banking Corporation *v.* Lo Lee Shi.

Bills of Exchange Act of 1882, S 64—Alteration referred to in—Accident—Alteration due to, if included.

S. 64 of the Bills of Exchange Act of 1882 (corresponding to S. 87 of the Negotiable Instruments Act) relates only to alterations effected by the will of the person by whom or under whose directions they are made and does not apply to a change due to pure accident.

Negotiable Instrument—Operative part of—Number if part of—Bank of England note—Rule in case of.

The number is no part of the operative portion of a bill of exchange or promissory-note.

---

*P.C. Appeal No. 104 of 1927. 19th January, 1928.

P. C.

Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi.

Quaere: Whether the number even of a Bank of England note is part of the contract?

Negotiable Instrument—Bank note issued by private bank—Mutilation by accident of—Liability of Bank for payment in case of—Conditions—Note identifiable but number missing—Effect.

On a claim for payment made against a private Banking Corporation on a bank-note issued by it but damaged by honest accident, it is essential to investigate whether there is sufficient of the note remaining to establish its identity as a note of the bank, and to contain all the necessary elements that render it valid and effectual as a negotiable document. To some extent this must depend upon verbal evidence as well as upon the pieces of the document. These pieces must be identified, their condition must be explained, and they must be shown to be parts of one and the same instrument. Where every one of these conditions has been satisfied, where it is not denied that the pieces are pieces of one of the notes of the defendant bank, and where it is not, and could not be, suggested that the missing particles could be used in building up another note, the Bank cannot refuse payment upon the ground that the number is missing.

Appeal No. 104 of 1927 from the Supreme Court of Hong Kong.

W. A. Jowitt, K. C. and *J. Forster* for appellants.

Respondent unrepresented.

19th January, 1928. The judgment of their Lordships was delivered by

Lord Buckmaster.

LORD BUCKMASTER.—Their Lordships notice with approval that this case has been brought before them for consideration within twelve months of its first hearing before the Puisne Judge in Hong Kong. They wish that this example of expedition was widely known and imitated.

The point that arises for decision is singularly free from authority, but fortunately the facts are beyond dispute. The appellants are the Hong Kong and Shanghai Banking Corporation, who carry on the business of banking in Hong Kong. In the course of their business they issue bank-notes for various sums; such notes are not legal currency but, owing to the high credit of the appellants, they are used as if they were. The bank is under liability to the Government of Hong Kong to deposit dollars as against all notes issued over a certain amount and a tax is payable at the rate of 1 per cent. per annum on the value of notes in circulation. Apart from these conditions, which it may be assumed would apply to every bank in Hong Kong, the appellants have no special relationship with the Government at all. The notes they issue are in the ordinary form of a bank-note. The name of the bank is at the head, the amount of the note is written in figures in the right and

P. C.
Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi.
Lord Buckmaster.

left-hand corners. In the middle of the document the number of the note appears in two places on the same line, one on each side; below this there comes the promise to pay the bearer on demand at the office of the Bank the amount of dollars, stated in words, for which the note is issued. Underneath this promise the value of the note appears again in large light letters, over which is written "Hong Kong" followed by a date, and then "by order of the Board of Directors" with the signature of the Chief Accountant and the Chief Manager.

Lo Lee Shi, who is the respondent in this appeal, was given by her husband two of such notes, each for five hundred dollars. She placed them in the pocket of some garment, and then, having forgotten their hiding-place, she washed, dried and starched the garment, and was proceeding to iron it when she found a wad of paper in the pocket; this upon extraction proved to be the remains of the two bank-notes which, together with the coat, had been subjected to all the above processes. Considerable effort was made, with the help of the bank, to restore these agglutinated fragments to their original shape and, as to one note, this met with complete success, and the note was accordingly paid. The full restoration of the other was more difficult; with the utmost skill the number could not be recovered. Apart from this, a very considerable portion of the note was replaced and its most critical characteristics were made plain—the name of the bank, the amount of the note, the definite promise to pay the "Bearer" on demand at the appellants' office, and the signatures by the Chief Accountant and the Chief Manager were all clearly and definitely evidenced. The bank, however, refused payment mainly upon the ground that the number was missing, and Lo Lee Shi accordingly brought an action against them upon the note.

The Judge on the trial of the action found in favour of the plaintiff. On appeal to the Full Court the Judges were divided, the Chief Justice being in favour of the defence and the Trial Judge, who formed the other member of the Court, affirmed his own judgment. The bank, anxious to know their true legal position with regard to a note whose number was defaced, brought this appeal, but the respondent, deterred no doubt by fear of cost, has not appeared. The case has, however, been fully and carefully placed before the Board, who see no reason to think that any relevant matter escaped their attention. The real point of controversy is this. In the circumstances above stated are the appellants liable on a note whose number has been accidentally defaced? The case to which most consideration was given both in the earlier

P.C.
Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi.
Lord Buckmaster.

Courts and in argument on the appeal was the case of *Suffel* v. *The Bank of England*,[1] but their Lordships think that apart from certain dicta the actual decision is of little assistance. In that case certain Bank of England notes had been intentionally and fraudulently altered by changing a 5 in the numbers to a 3. After this alteration the notes having come into the hands of a perfectly innocent holder, he presented them for payment to the bank, who refused to honour them on the ground that the change in the number effected a material alteration in the document by virtue of which their liability was discharged. The action was brought upon the notes. The Court of Appeal decided in favour of the bank, but the grounds of their decision were these—First, that according to old and indisputable law the alteration of a deed in a material respect avoided the document; secondly, that this doctrine had become extended to ordinary written documents and was applicable to bills of exchange and promissory notes; and thirdly, that upon a Bank of England note, which the bank was bound to issue against bullion and which by law was currency, the alteration of the number was a material alteration.

The authority for the first two of these propositions needs no further investigation; for those interested in the subject the history of the principles will be found fully examined in the judgments of the learned Judges in the case referred to, but since the date of that decision the law has been summarised in section 64 of the Bills of Exchange Act, 1882, whose terms are literally reproduced for Hong Kong in the Bills of Exchange Ordinance, 1885, section 64, in the following terms:—

"*Alteration of bill.*

"64.—(1) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorised, or assented to the alteration, and subsequent indorsers: Provided that where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered and may enforce payment of it according to its original tenor.

"(2) In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

Both the history of the law which this section enunciates and the terms of the section itself show that it relates only to

1. (1882) 9 Q.B.D. 555.

P. C.
Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi.
Lord Buckmaster.

alterations effected by the will of the perosn by whom or under whose directions they are made, and that it does not apply to a change due to pure accident.

The alteration contemplated is one to which all parties might assent. It is not reasonable to assume parties assenting to a part of the document being effaced by the operations of a mouse, by the hot end of a cigarette, or by any of the other means by which accidental disfigurement can be effected. Again, the provision which excepts from the category of persons against whom the bill is avoided, a party who has "himself made, authorised, or assented," to the alteration cannot reasonably apply to the ravages of a rat, a white ant, or any other animal pest. The fact that the change is accidental in itself negatives the possibility of assent.

The case of *Davidson v. Cooper*[2] emphasises the point, since there Lord Denman states that the party who may suffer if a document is avoided by alteration has no right to complain, since there cannot be any alteration except through fraud or laches on his part, meaning a fraudulent alteration, effected by the party or carelessness permitting it to be effected by another. It is not on that section that the solution to this difficulty is to be found, and yet it is upon the authority of the case which depended on this law that the learned Chief Justice bases his judgment, holding that the accidental obliteration of the number was an alteration within the meaning of the section, and that the case quoted showed that such alteration was material. It is, therefore, necessary to determine this case apart from the ordinance, and in this connection their Lordships do not think the question of negligence plays any part. The right of a party to sue on the note in the event of its being defaced by fire or attacked by a mouse cannot depend upon whether it had been placed in a fire-proof or a mouse-proof safe or left in an ordinary box. When once honest accident is accepted as the cause of damage, the only remaining question is whether the extent of the damage is such as to prevent the note being sued upon, and it may be also whether the missing material parts can be supplied by verbal evidence, though that question does not now arise. In the first instance, therefore, it is essential to investigate whether there is sufficient of the note remaining to establish its identity as a note of the bank, and to contain all the necessary elements that render it valid and effectual as a negotiable document. To some extent

2. (1844) 13 M. & W. 343.

P. C.

Hong Kong and Shanghai Banking Corporation v. Lo Lee Shi.

Lord Buckmaster.

this must depend upon verbal evidence as well as upon the pieces of the document. These pieces must be identified, their condition must be explained, and they must of course be shown to be parts of one and the same instrument. In this case every one of these conditions has been satisfied. It is indeed not denied that the pieces are pieces of one of the appellants' notes, nor is it, or could it be, suggested that the missing particles could be used in building up another note. It is the absence of the number on which the appellants rely, and this is no part of the operative portion of a bill of exchange or promissory note, although its alteration was held to be material in the case of a Bank of England note, owing to its special features: see *Suffell's case*,[1] Jessel, M. R. and Cotton, L. J. Alteration, within the meaning of the statute, is not what has taken place here—and apart from this, it is difficult to see what has destroyed the liability of the bank upon a document admitted to be one of their notes. Brett, L. J. (*Suffell's case*[1]) states at pp. 566 and 568 that the number even of a Bank of England note is no part of the contract, and its alteration does not affect the contract, and Cotton, L. J., at p. 574, appears to take the same view, though Jessel, M. R., leaves the question open. In their Lordships' opinion the contract here has never been altered and is sufficiently evidenced by the mutilated document and the verbal testimony.

Their Lordships do not think that beyond their decision as to the meaning of the ordinance it is possible in this case to lay down any general principles of law; they desire their judgment to be limited to this point, that in the special circumstances of this case it is possible, by means of the fragments of the document assisted by verbal evidence, to establish a claim against the bank for the 500 dollars due upon the note, and that accordingly this appeal should be dismissed, and they will humbly advise His Majesty accordingly.

Solicitors for appellants: *Stephenson, Harwood & Tatham.*

K.J.R. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

M. P. Mangala Goundar .. *Petitioner** (*1st Respt.*)

v.

P. S. Ayyathorai Mudaliar and another .. *Respondents.*

Mangala Goundar v. Ayyathorai Mudaliar.

Madras District Municipalities Act (*V of* 1920), *Ss* 49 *and* 51—*Election of Councillor to Municipality—Disqualification of successful candidate*

---

*C.R.P. No. 1542 of 1927. 29th November, 1927.

1. (1882) 9 Q.B.D. 555, 563, 575.

at the time of the election—Remedy—Rules for the decision of disputes as to the validity of election—Rule 11 (c)—Petition by defeated candidate to set aside election on the ground of disqualification at the date of nomination and election—Maintainability—Trustee of temple—If an employer of hereditary Archaka of the temple—"Employee" and "servant"—Meaning of.

Mangala Goundan v. Ayyathorai Mudaliar.

A petition by an unsuccessful candidate in the election of a Councillor to a Municipality, objecting to the election on the ground that the successful candidate was disqualified at the time of the election from standing as a candidate for the vacant councillorship as he was at the date of nomination and election the employer of a councillor within the meaning of S. 49 (2) (vi) of the Madras District Municipalities Act is not maintainable. The only way of unseating the successful candidate on such a ground is by a proceeding before the District Judge under S. 51 of the Act.

Rule 11 (*c*) of the rules relating to the decision of disputes as to the validity of an election framed under the Madras District Municipalities Act only refers to what happens during the actual election itself and does not refer to anything antecedent to the actual election such as the disqualification of a candidate at the time of the election. The disqualification of a candidate cannot be called an irregularity in respect of the nomination paper within the meaning of Rule 11 (*c*) and the words "non-compliance with the provisions of the Act or the rules made thereunder" in the Rule only mean non-compliance by the officer whose duty it is to fix the date of election, receive votes and act as polling or returning officer.

Observation of Ramesam, J, to the contrary in *Devasigamony* v. *Sethurama Aiyar,* (1924) 87 I.C. 363 disapproved.

Obiter: A trustee of a temple is not the employer of a hereditary Archaka of the temple within the meaning of S. 49 (2) (vi) of the Madras District Municipalities Act. The word "servant" as used in this section means not a subordinate but one who gives his service to his master; and the word "employer" is used in the sense of a person employing any one for his benefit or on his own benefit. The word "servant" cannot apply to a person who is under the authority of another, nor the word "employer" to a person who is only asked to supervise the work of another.

Petition under section 115 of Act V of 1908 and section 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Dindigul, dated 27th October, 1927 in O.P. No. 8 of 1926.

The Advocate-General (T. R. Venkatarama Sastri), K. V. Krishnaswami Aiyar and *K. Periasami Goundan* for petitioner.

B. Sitarama Rao and *S. R. Muthusami Aiyar* for respondents.

The Court delivered the following

JUDGMENT.—This is an application under section 115 of the Civil Procedure Code for revising the order of the Subordinate Judge of Dindigul, setting aside the election of the petitioner as Councillor of the Palani Municipality.

Mangala Goundar v. Ayyathorai Mudaliar.

The facts are: The petitioner and the respondents contested the seat for the first ward in the Palani Municipality at the election held on 10th September, 1926. The petitioner came up at the top of the poll and was declared elected. The 1st respondent filed a petition before the Subordinate Judge of Dindigul objecting to the election of the petitioner on the ground that he was disqualified at the time of the election from standing as a candidate for the vacant councillorship as he was at the date of nomination and election the employer of a sitting Councillor, one Selva Dandapani Gurukkal. Several issues were raised and on the issue as to jurisdiction, the Subordinate Judge held that the Civil Court had no jurisdiction to go into the question of disqualification when once the Government passed an order under Rule 31 upholding the validity of the nomination on the specific ground alleged in the petition itself and made a few observations on the other issues and dismissed the petition. The 1st respondent applied to this Court in *Ayyathorai Mudaliar* v. *Mangala Goundar*[1] for revising the order of the Subordinate Judge and a Bench consisting of Madhavan Nair and Curgenven, JJ., decided that

"the Lower Court erred in holding that the decision of the Government under Rule 31 regarding the validity of 1st respondent's (petitioner herein) nomination was final or binding upon the Court in this case."

The learned Judges set aside the order of the Subordinate Judge and directed him to dispose of the petition on the merits. He has now held that Dandapani Gurukkal was a servant of the petitioner and the petitioner was, therefore, disqualified for election under section 49, clause (vi) of the District Municipalities Act, and his election was consequently void, and set aside the election of the petitioner and ordered a fresh election to be held.

The learned Advocate-General puts forward two contentions against the order of the Subordinate Judge. The first is that the election petition was incompetent, and the only way of unseating the petitioner was by a proceeding under section 51 of the District Municipalities Act; and the second is that Selva Dandapani Gurukkal was not a servant of the petitioner.

In order to appreciate the contentions of the petitioner it is necessary to refer to a few of the sections of the District Municipalities Act. Chapter IV is headed "Election and Appointment of Councillors." Section 43 relates to the division of the Municipality into wards. Section 44 relates to the pre-

1. (1927) 53 M.L.J. 735.

Mangala Goundar v. Ayyathorai Mudaliar.

paration and publication of the electoral roll. Section 45 lays down who are qualified to vote. Section 46 relates to the personal qualifications of voters and section 47 to disqualifications of voters. Sections 48, 49, 50 and 51 are headed "Qualifications for membership of Council." Section 48 lays down who are qualified for election. Section 49 mentions all the disqualifications of candidates for election. Section 50 lays down the disqualification of Councillors. Section 51 indicates what steps should be taken for a declaration that a Councillor is not qualified to be a Councillor. One of the disqualifications of a candidate for election is that he is the servant or employer of a Councillor—section 49 (2) (vi).

Selva Dandapani Gurukkal is the hereditary Archaka of the Dandayudapani temple in Palani and the petitioner is a trustee of the temple. The duty of Dandapani Gurukkal is to perform the worship according to his turn or *murai*, which is once in 40 days, and he is remunerated by perquisites collected from the worshippers and he is also entitled to a share of the food offerings and certain emoluments. The duty of the petitioner as trustee is to manage the affairs of the temple and to see that the worship is performed according to the usage of the temple and that the temple property is conserved and not wasted. The contention of the learned Advocate-General is that the disqualification of a candidate under section 49 cannot furnish a ground for an election petition, and if he is a disqualified candidate his nomination paper ought to have been rejected by the scrutinising officer before the election, and after the election has been held and after he has been declared elected the only remedy is by moving the District Judge under section 51 of the Act. The contention of Mr. Sitarama Rao for the 1st respondent is that the election petition could be sustained on the ground of disqualification existing at the time of the election and it is not necessary that an application should be made under section 51, and further that the 1st respondent being a defeated candidate he is entitled to agitate the question whether the petitioner is or is not a properly qualified person by an election petition; for, if he is a disqualified person, his election would be bad, and the respondent would be entitled to be declared elected, and still further, if the remedy under section 51 is the only remedy, he would be without a remedy and the Legislature could not have intended such a result.

The Government have framed rules for the conduct of elections and for the decision of disputes as to the validity of an

Mangala Goundar v. Ayyathorai Mudaliar.

election. When a seat becomes vacant, not less than 20 days before the date fixed for the holding of the election the Chairman shall prepare and publish a notice in English and in the vernacular of the locality stating the number of persons to be elected and the wards for which they are to be elected and other details. Under Rule 2 the nomination of candidates shall be made in Form No. 1; Rule 2 (*a*) requires certain formalities to be gone through on the presentation of the nomination paper. Under Rule 3 the Chairman fixes a date for the scrutiny of the nomination papers. Under Rule 4 (1) the candidates, one election agent, one proposer and one seconder of each candidate and one other person duly authorised in writing by each candidate may attend at the time and place fixed for the scrutiny. Under Rule 4 (2) the Chairman shall then examine the nomination papers and decide all objections which may be made at the time to any nomination and may either on such objection or on his own motion after such summary enquiry if any, as he thinks necessary, reject any nomination on any of the following grounds: (1) that the candidate is ineligible for election under sections 48 and 49 of the District Municipalities Act; (2) that the proposer or seconder is a person whose name is not registered on the electoral roll; and (3) that there has been any failure on the part of the candidate or his proposer or seconder to comply with any of the provisions of Rule 2. Under sub-rule (3) he shall endorse his decision on the nomination paper. Under Rule 5 (*a*) the Chairman shall prepare a list of persons whose nominations have not been rejected and who have not withdrawn their candidature in Form III and publish it not later than 4 days before the date fixed for election. Rule 5 (*b*) says that the list shall describe the candidates as in their nomination papers and exhibit their names in alphabetical order.

In Rule 11 of the rules for the decision of disputes as to the validity of an election several grounds are set forth which on proof would invalidate the election. The clause upon which the 1st respondent relies is clause (*c*) which says:

"If the result of the election has been materially affected by any irregularity in respect of a nomination paper, or by the improper reception or refusal of a vote, or by any non-compliance with the provisions of the Act or the rules made thereunder, the election of the returned candidate shall be void."

The question is whether the disqualification of a candidate before election is one of the grounds covered by clause (*c*).

Before examining that, it is necessary to see whether section 51 is a bar to the maintenance of an election petition on the ground of one of the disqualifications mentioned in section 49 existing at the time of the election.

Section 51 reads as follows:

(1) "Whenever it is alleged that any person who has been elected or appointed as a Councillor is disqualified under section 49 or section 50, and such person does not admit the allegation, or whenever any Councillor is himself in doubt whether or not he has become disqualified for office, such Councillor, or any other Councillor may, and the Chairman, at the request of the Council, shall apply to the District Judge of the district in which the Municipality is situated.

(2) The said Judge, after making such inquiry as he deems necessary, shall determine whether or not such person is disqualified under section 49 or section 50, and his decision shall be final.

(3) Pending such decision the Councillor shall be deemed to be qualified."

This section provides what course should be adopted if a person disqualified under section 49 is elected a Councillor. The question is, when a special statute like the District Municipalities Act lays down a certain course to be pursued in the case of certain persons, is it open to the Court to hold that the ordinary remedy by way of an election petition is open notwithstanding the special remedy provided by the Act. The argument of Mr. Sitarama Rao is that the special remedy is not open to the 1st respondent, the defeated candidate, and that he having suffered defeat is not to be deprived of the remedy at law by reason of anything contained in section 51 and that Rule 11 (*c*) of the rules for the decision of disputes as to the validity of election applies to the present case. The Municipalities are the creation of a special statute and the qualifications for the Councillorship are laid down in the statute and the several disqualifications of candidates are set out *seriatim* in section 49. If such disqualifications are overlooked at the time of the scrutiny the method of removing the Councillor is provided in section 51. Cl. (3) of section 51 seems to exclude any other remedy, for, it says distinctly "pending such decision the Councillor shall be deemed to be qualified." The plain meaning of clause (3) would exclude any other remedy, as no decision of any other tribunal in any other proceeding declaring the Councillor to be disqualified would have any force when the clause says he shall be deemed to be qualified unless and until the decision of the District Court is given against him. To allow another remedy

Mangala Goundar v. Ayyathorai Mudaliar.

to be pursued would result in conflicting decisions. If the District Judge were to hold on a reference by the petitioner or by another Councillor, or by the Chairman at the request of the Council that the Councillor was not disqualified at the time of the election, and if the Court which hears the election petition were to hold that the election was bad as the petitioner was disqualified to be a candidate at the time of the election, there would be two conflicting decisions and the question would be which should prevail. It is not right to impute to the Legislature the enactment of a statute which would give rise to conflicting decisions.

It is urged by the learned Advocate-General that the rules are framed under the rule-making power given to the Government under section 303 of the District Municipalities Act and the rules framed under the Act cannot override the clear provisions of the Act and when there is a conflict between the rules and the Act, the Act might prevail. In the view I take of clause (*c*) no such conflict exists, for I am of opinion that an election petition on the ground of disqualification of a candidate at the time of the election would not lie. Clause (*c*) says:

> "If the result of the election has been materially affected by any irregularity in respect of a nomination paper, or by the improper reception or refusal of a vote, or by any non-compliance with the provisions of the Act or the rules made thereunder, the election of the returned candidate shall be void."

Mr. Sitarama Rao contends that the clause "affected by any irregularity in respect of a nomination paper" would cover the present case. It refers only to the irregularities in the nomination paper and not to the disqualification of the candidate. Under the rules as I have already mentioned, certain formalities have to be gone through before the nomination paper would be accepted and the candidate declared eligible to be elected. The irregularity mentioned therein is with respect to names, numbers and other particulars which the nomination paper should contain. The question of disqualification is a matter to be decided by the scrutinising officer, the Chairman. If the Chairman on hearing the objections declares that the nomination paper is accepted, the candidate whose nomination paper has been accepted is entitled to contest the election. If he accepts the nomination paper of a disqualified candidate any rival candidate has his remedy by appealing to the Government against the decision of the Chairman. After the nomination paper is accepted election is held. Rule 11 of the rules relating to the decision

of disputes as to the validity of an election concerns itself only with the irregularities or illegalities that might be committed during the conduct of the election, and no mention is made of anything that might have happened previous to it. If it was the intention of the framers of the rules to make the disqualification of a candidate a ground for declaring his election invalid, I fail to see why they could not have put it as one of the grounds in Rule 11. On reading Rule 11 it is clear that it can only refer to what happens during the actual election itself. Therefore, the phrase "non-compliance with the provisions of the Act" cannot refer to anything antecedent to the actual election itself, such as the disqualification of a candidate at the time of the election, but only to the conduct of the election during which any of the provisions of the Act or the rules thereunder may be violated. Section 314, which was not referred to by either side during the course of the argument, provides sufficient remedy against a disqualified member acting as Councillor; for it says:

"If a member of the Council acts as such when disqualified under section 50, he shall, on conviction, be punished with fine not exceeding two hundred rupees for every such offence."

The Legislature has provided sufficient safeguards against violation of any of the provisions of sections 49 and 50, in other words against a disqualified member of the Council acting as a member. With regard to the irregularities under Rule 11 (*c*) many things might be mentioned; the non-removal of a deceased candidate's name; the non-removal of the name of a candidate who has withdrawn; the wrong description of a candidate whose nomination paper has been accepted. All these things would be irregularities in respect of the nomination paper and the disqualification of a candidate cannot, by any stretch of imagination, be called an irregularity in respect of the nomination paper, and non-compliance with the provisions of the Act or the rules made thereunder can only mean non-compliance by the officer whose duty it is to fix the date of election, receive votes and act as polling or returning officer.

Granting for argument's sake that the disqualification of a candidate is one of the grounds covered by Rule 11, on a careful consideration of the scope of the District Municipalities Act and the provisions relating to the election and appointment of Councillors, I have no hesitation in holding that the proper and only remedy, in case a disqualified candidate is elected, is by a proceeding under section 51. I am not at all impressed with the argu-

Mangala Goundar v. Ayyathorai Mudaliar.

ment that the defeated candidate would be without a remedy if such an interpretation is put upon section 51. The defeated candidate could very well request one of the Councillors to move the District Judge or induce the council to request the Chairman to move the District Judge; and, if neither an individual Councillor nor the Council as a body would move in the matter, still a third remedy is open to any member of the public against a disqualified Councillor sitting and voting as such, of laying information against him under section 314.

As it is unnecessary to consider at length the case quoted on this point for I hold that the words of section 51 negative any other remedy, I shall briefly refer to some of them. In *Pasmore* v. *Oswaldtwistle Urban District Council*[2] the facts were that the plaintiff, a paper manufacturer and the owner and occupier of a factory, required the local authority called the Oswaldtwistle Urban District Council pursuant to the Public Health Act of 1875 to cause to be made such sewers as may be necessary for effectually draining their district and in particular his premises and to give facilities for enabling him to carry into their sewers the liquids proceeding from his factory or manufacturing processes and the defendants refused to comply with such requirements. The plaintiff claimed a mandamus commanding the defendants to cause to be made such sewers as may be necessary for effectually draining their district and to give facilities for enabling the plaintiff to carry the liquids proceeding from his factory into the sewers under their control. Charles, J., before whom the case was tried, held that the plaintiff was entitled to a writ of mandamus under the Act of 1875 but that the only tribunal which could enforce a claim under the Act of 1875 was the County Court. The defendants appealed against the judgment for a mandamus, and the Court of appeal entered judgment for the defendants dismissing the action with costs. The plaintiff appealed to the House of Lords and his appeal was dismissed. Lord Halsbury observed at page 394:

"The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which is very familiar and which runs through the law. I think Lord Tenterden accurately states that principle in the case of *Doe* v. *Bridges* [(1831) I.B. and Ad. 847 at 859]. He says where an Act creates an obligation and enforces the performance in a specified manner we take it to be a general rule that performance cannot be enforced in any other manner. . . . You

2. (1898) A.C. 387.

Mangala Goundar v. Ayyathorai Mudaliar.

must take your stand upon the statute in question, and the statute which creates the obligation is the statute to which one must look to see if there is a specified remedy contained in it. There is a specified remedy contained in it, which is an application to the proper Government department."

In *Barraclough* v. *Brown*[3] it was held that

"where a statute gives a right to recover expenses in a Court of summary jurisdiction from a person who is not otherwise liable, there is no right to come to the High Court for a declaration that the applicant has a right to recover the expenses in a Court of summary jurisdiction; he can only take proceedings in the latter Court."

Lord Herschell observed at page 620:

"I do not think the appellant can claim to recover by virtue of the statute and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

Lord Watson observed at page 622:

"The right and the remedy are given *uno flatu* and the one cannot be dissociated from the other. By these words the Legislature has, in my opinion, committed to the summary court exclusive jurisdiction, not merely to assess the amount of expenses to be repaid to the undertaker, but to determine by whom the amount is payable; and has therefore, by plain implication, enacted that no other Court has any authority to entertain or decide these matters."

The observation of Lord Watson applies with great force to the present case, for section 51 (3) clearly says "Pending such decision the Councillor shall be deemed to be qualified." *Parthasaradhi Naidu* v. *Koteswara Rao*[4] is not a direct authority on the point. In that case a petition was filed objecting to the election of a person as President of the Narasaraopet Taluk Board. Sections 55 and 56 of the Local Boards Act corresponding to sections 49 and 50 of the District Municipalities Act were under consideration in that case. The Full Bench held that the District Judge on an election petition could not go into the question whether a particular candidate was duly appointed as a member of the Board. Mr. Sitarama Rao urges that no objection was taken to the maintenance of the election petition itself and therefore it must be considered as an authority in his favour. I am unable to accept this argument. The question whether an election petition would lie or not on the ground of disqualification of a member was not put in issue in that case. The question was whether the District Judge was competent to go into the question of the validity of the appointment of a

3. (1897) A.C. 615.

4 (1923) I.L.R. 47 M. 369: 46 M.L.J. 201 (F.B.).

Mangala Goundar v. Ayyathorai Mudaliar.

person as a member of the Taluk Board when his election as President was questioned. As observed by Waller, J.:

"The Act, no doubt, provides that the President shall be elected from among the members of the Board, but that provision does not give the Judge jurisdiction on an election petition to consider whether the members have or have not been properly appointed. He cannot disqualify them save on grounds that are not applicable here."

The English cases quoted by Mr. Sitarama Rao do not help him, for, under the Municipal Corporation Act of 1882, 45 and 46 Vic. c. L, section 87 (*c*), the disqualification of a candidate is a ground for questioning the election. Clause (*c*) reads "that the person whose election is questioned was at the time of the election disqualified." Under the English election rules the returning officer is not empowered to reject a nomination paper on the ground that the candidate is disqualified. As there is no scrutiny of a nomination paper as here and as the nomination paper could not be rejected the disqualification of a candidate is made a ground for an election petition under section 87 (*c*). As I have already observed, if the framers of the rules for the decision of disputes as to the validity of elections wanted to make disqualification of a candidate at the time of the election a ground for an election petition, they could have said so in so many words having in view the English practice. It could not be said that the framers of the Madras Rules were unaware of the provisions of the English statute 45 and 46 Vic. c. L. *Pritchard* v. *Mayor, etc., of Bangor*[5] does not help the 1st respondent. There it was held that the returning officer had no jurisdiction to determine the question of disqualification, the proper method for deciding that question being an election petition as provided in the Municipal Corporation Act of 1882, section 87. *Harford* v. *Linskey*[6] has no application to the present case. Under the English Act an election could not be questioned except by an election petition. Here a candidate could be declared disqualified by the Chairman and his nomination paper rejected, and if the Chairman acts against the provisions of the Act the remedy is by appeal to Government. There may be other remedies, but it is unnecessary to consider in this case whether there are, or there are not, remedies against the action of the scrutinising officer, for any observation of mine would only be *obiter* as they are not now under consideration.

---

5. (1888) 13 A.C. 241.

6. (1899) 1 Q.B. 852.

Gopala Aiyangar v. *Ebrahim Rowther*[7] and *Sarvothama Rao* v. *Chairman, Municipal Council, Saidapet*[8] have no application to the present case, as the question of the maintainability of an election petition on the ground of disqualification was neither raised nor decided in those cases. *Lakshminarasimha Somayagiyar* v. *Ramalingam Pillai*[9] does not touch the present question. In that case a suit was brought for a declaration that the election of the 2nd defendant to a seat on the Taluk Board of Shermadevi was illegal and invalid. *S. K. Devasigamony* v. *M. R. Sethuratna Aiyar*[10] is strongly relied upon by Mr. Sitarama Rao as supporting his contention. In that case an *ex officio* member of a District Board, who had ceased to be such at the time, proposed another member of the Board to be the Vice-President of the Board. An objection was taken that the proposal was not legally made by a member of the Board; but it was overruled and the person proposed got the largest number of votes. An election petition was filed against the successful candidate in the Court of the Subordinate Judge of Trichinopoly. Against the order of the Subordinate Judge a petition was filed in this Court under section 115.

Ramesam, J., in disposing of the case made the following observation:

"I, therefore, decide that the validity of the vote of Mr. Pethachi Chettiar can be and ought to be decided in this election petition."

With very great respect I am unable to agree with him. Diwan Bahadur Pethachi Chettiar, it was alleged, had ceased to be a member before he made the proposal. The election Court can only go into the question of the regularity or otherwise of the election after the nomination had been accepted. The question whether the proposer was a member who was qualified to propose and the objection which was overruled by the Chairman or President could not be gone into in an election petition. As I have already observed, where the statute itself gives a remedy for an infraction of any of its provisions it is not open to the Court to hold that another remedy not specifically provided for is open. In this connection I may refer to the observation of Lord Shaw of Dumferline in a recent case *Shannon Realties, Ltd.* v. *St. Michel (Ville De)*[11]:

"Where alternative constructions are equally open, that alternative is to be chosen which will be consistent with the smooth working of

7. (1925) I.L.R. 48 M. 509: 49 M.L.J. 606 (F.B.).
8 (1923) I.L.R. 47 M. 585: 45 M.L.J. 23.
9. (1920) 39 M.L.J. 319.
10. (1924) 87 I.C. 363.
11. (1924) A.C. 185 at 192.

Mangala Goundar v. Ayyathoral Mudaliar.

the system which the statute purports to be regulating; and that alternative is to be rejected which will introduce uncertainty, friction or confusion into the working of the system."

In view of my decision on the first point it is not necessary to discuss the second point at length. But inasmuch as considerable argument has been advanced on both sides I will briefly notice them. The question is whether the hereditary archaka of a Hindu temple is a servant of the trustee of the temple or whether the trustee is an employer of the hereditary archaka. The hereditary archaka of a temple is not a person appointed by the trustee. He holds his office by virtue of hereditary right. He has to perform worship in the temple according to the Agama's which regulate such worship, and he has to perform the worship at such times and on such occasions as the usage of the temple enjoins. He cannot deviate from the usage of the temple. The trustee of a temple has the duty of looking after the interests of the temple and consequently the right to enforce strict adherence to the usages of the temple. The contention of Mr. Sitarama Rao is that inasmuch as the trustee has power to suspend or dismiss the hereditary servants for proper reasons he must be deemed to be their employer. The mere fact that one person has control over another would not make the latter a servant of the former. The archaka is a servant not of the trustee but of the temple, that is of the deity, whether it be god or goddess. The trustee of a Hindu temple is not a trustee in the English sense of the word inasmuch as no property vests in him and he is not the legal owner of the temporalities of the temple. He is only a manager with certain rights and duties attached to his office. He cannot deal with the properties of the temple as he likes. He can no doubt for certain purposes alienate the property of the temple; but that would not in any way make him the owner of any of the properties belonging to the temple. The word "servant" as used in section 49 means not a subordinate but one who gives his service to his master; and the word "employer" is used in the sense of a person employing any one for his benefit or on his own account. The word "servant" cannot apply to a person who is under the authority of another, nor the word "employer" to a person who is only asked to supervise the work of another. The trustee is as much a servant of the deity as the hereditary archaka. The trustee cannot depart from the usages of the temple any more than the archaka, nor can he change the usage of the temple in the way he likes. I cannot uphold the con-

tention that the archaka is a servant of the trustee within the meaning of clause (vi) (2) of section 49.

The cases relied upon by Mr. Sitarama Rao on this point do not help him. In *Seshadri Aiyangar* v. *Ranga Bhattar*[12] the observation is:

"The position of an archaka on the other hand, though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant. The trustee is the representative of the temple and the archaka must be subject to his disciplinary authority."

This observation cannot be taken to mean that the learned Judges held that the archaka was a servant of the trustee. The decision of the Privy Council in *Bull & Co.* v. *West African Shipping Co.*[13] has no application to the present case. In that case the plaintiff let out a lighter to the defendant. Part of the agreement was that the lighter should be manned by two boys. The boys left the lighter and it came to grief. The Privy Council upsetting the judgment of the Appellate Court and restoring that of the trial Judge held that the lighter boys were under the control of the defendant and, therefore, he was responsible for their negligence and the consequent loss. When a person lends his servant to another person, he places him under his control, and the servant is bound to work for him and be under his direction. The person who has this benefit of the services of a temporarily lent servant is in the position of a master and, therefore, is responsible for his acts or negligence. It is difficult to see how this case can help the 1st respondent here. The passage in 20 *Hals.* 260 applies only to cases where a person employs one for his own benefit whether that person is actually paid by him or not. In *Grenville Smith* v. *Tomlin*[14] a salaried clerk was a clerk of the committee which was appointed jointly by the Corporation of a borough and the Council of the Urban District. It was held that he could not be the Chairman of the Urban District Council inasmuch as he was a salaried officer of the committee appointed by the Council. An observation of mine in *Vanamamalai Jeer Swamigal* v. *Venkataramana Chariar*[15] is relied upon by Mr. Sitarama Rao. In that case the question was whether the archaka of a temple was entitled to the possession of the temple. The passage is: "The position, therefore, of the archakas of the temple is only that of servants." It is clear from the context that that

12. (1911) I.L.R. 35 M. 631 at 633: 21 M.L.J. 580.
13. (1927) A.C. 686.
14. (1911) 2 K.B. 9.
15. (1922) 16 L.W. 931.

Mangala Goundar v. Ayyathorai Mudaliar.

passage means that the archakas are servants of the temple and not of the trustee. In *Stone* v. *Cartwright*[16] it was held that a person who employs servants for another is not liable for the tort of the servants.

Lord Kenyon observed:

"In all these cases I have ever understood that the action must either be brought against the hand committing the injury, or against the owner for whom the act was done; but it was never heard of that a servant who hires labourers for his master was answerable for all their acts."

In *The King* v. *Hoseason*[17] it was held that the employer of the servant is the master for whose service he is retained, and not the bailiff of the firm, who in fact hires the servant. The trustee of a Hindu temple is only a glorified bailiff of the deity of the temple. I hold that the hereditary archaka of a Hindu temple is not a servant of the trustee of the temple within the meaning of clause (vi) (2) of section 49 of the Act.

In the result the order of the Lower Court is set aside and the petition is allowed with costs throughout. Vakil's fee Rs. 100.

N.S. *Petition allowed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Madras.]

PRESENT:—LORD SHAW, LORD CARSON, LORD SALVESEN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

The Secretary of State for India in Council .. *Appellant**

v.

Volkart Brothers, through their authorized agent, H. Bachtold .. *Respondents.*

P. C.

The Secretary of State for India v. Volkart Brothers.

Lease—Lease for term—Renewal of, at option of lessee—Covenant for—Specific performance of—Right to—Portion small of demised property—Person owning and possessing only, at expiry of term—Right of, to claim renewal as regards entire property demised or the part in his possession—Owners of remaining part neither parties to suit nor claiming renewal

The East India Company demised a piece of land to one *F* for a term of 99 years at a stated yearly rent. Amongst other covenants the lease contained one in the following terms:—

---

*P.C. Appeal No. 22 of 1928. 24th July, 1928.

16. (1795) 101 E.R. 622.

17. (1811) 14 East. 605: 104 E.R. 734.

P. C.

The Secretary of State for India v. Volkart Brothers.

"That he the said *F*, his heirs, executors, administrators or assigns fulfilling the covenants and agreements hereinbefore contained and on his part to be performed and yielding and paying at the end and expiration of the aforesaid term of 99 years unto the said United Company, their successors or assigns, the full and just sum of 100 pagodas current money of Fort St. George, then this lease shall and may be renewed for a further term of 99 years upon such terms and conditions as shall be judged reasonable."

At the date of the expiry of the term fixed by the lease, the respondents were in possession of only a small portion of the lands demised. They refused to give up possession, and thereupon the Secretary of State instituted a suit against them for the recovery of the portion in their possession. The respondents instituted a suit against the Secretary of State claiming a declaration that they were entitled to a renewal for 99 years of the term granted by the said lease as regards the whole of the property demised by the said lease, or, alternatively, as regards the part retained by the respondents and specific performance of the covenant for renewal. The owners of the remainder of the demised premises were not parties to the suit, nor did they make any claim to such renewal.

Held, that the respondents could not, under the circumstances, claim a renewal of the lease in respect of the small plot in their possession.

The covenant to renew was one to renew the lease as a whole, including the subject-matter of the demise, which is the parcels as set out in the lease. There is no contract to renew the lease for a part of the premises.

Held further, that the alternative claim to get a renewal of the whole plot was under the circumstances existing at the termination of the lease, untenable.

Consolidated Appeals No. 22 of 1928 against the decrees of the High Court of Madras, dated the 10th December, 1926, which affirmed decrees of the District Court of South Malabar, respectively, dated the 2nd September, 1922 and the 1st February, 1923 and made in Original Suits No. 4 of 1921 and No. 7 of 1921.

The case in the High Court is reported in I.L.R. 50 Mad. 595: 52 M.L.J. 443.

Dunne, K. C. and *K. Brown* for appellant.

Geoffrey Lawrence, K. C. and *F. McMillan* for respondents.

24th July, 1928. Their Lordships' judgment was delivered by

Lord Carson.

LORD CARSON.—By an indenture of lease executed on the 6th June, 1821, and made between the United Company of Merchants of England, trading to the East Indies, of the one part, and one Francis Schuler of the other part, the said United Company demised a piece of land lying between the town of Cochin and the river in the Province of Malabar, containing 253,700 square feet (acres 4.10), unto the said Francis Schuler

P.C.

The Secretary of State for India v. Volkart Brothers.

Lord Carson.

from the date thereof for the term of 99 years, at the yearly rent of Pagodas 6 F. 27 C. 25. Amongst other covenants the lease contained one in the following terms:—

"That he the said Francis Schuler, his heirs, executors, administrators or assigns fulfilling the covenants and agreements hereinbefore contained and on his part to be performed and yielding and paying at the end and expiration of the aforesaid term of ninety-nine years unto the said United Company, their successors or assigns, the full and just sum of 100 pagodas current money of Fort St. George, then this lease shall and may be renewed for a further term of ninety-nine years upon such terms and conditions as shall be judged reasonable."

The appellant is the successor in title of the said United Company, and by virtue of an assignment by the said Francis Schuler and divers subsequent assignments and acts in law the whole of the property comprised in the lease became vested in the respondents in the year 1907. Subsequently, in the year 1914, the respondents as vendors granted to the Cochin Club the right, title and interest of the vendors in a portion of the said lands demised by the said lease, amounting to 3 acres and 34 c., for a sum of Rs. 18.461. The said lease expired by efflux of time on the 6th June, 1920, and at that date the respondents were in possession of acres 1.10 only of the lands demised, and the Cochin Club having previously surrendered to the appellant their interest, purchased as aforesaid from the respondents, are in occupation of the said 3 acres and 34 c. as tenants at will to the plaintiff.

On the termination of the said lease the appellant claimed possession from the respondents of the part of the property then remaining in their occupation, and containing the 1 acre 10 c. already mentioned, and as such possession was refused commenced his suit on the 24th February, 1921, claiming possession of the same and mesne profits.

On the other hand, the respondents commenced their suit on the 31st October, 1921, claiming a declaration that they were entitled to a renewal for 99 years of the term granted by the said lease as regards the whole of the property demised by the said lease (save a small portion which had been acquired by the Government of Madras) or, alternatively, as regards the part retained by the respondents and specific performance of the covenant for renewal.

By a decree of the 2nd September, 1922, the appellant's suit was dismissed with costs by the District Judge of South Malabar, who decided that the respondents were entitled to claim a renewal in respect of the part of the property retained by them and not in

P. C.

The Secretary of State for India v. Volkart Brothers.

Lord Carson.

respect of any other part. On the hearing, therefore, of the respondents' suit on the 1st February, 1923, a decree was made that the appellant should execute a renewal of the lease on the terms mentioned in the decree in respect of the part of the leasehold premises in the occupation of the respondents.

The appellant appealed to the High Court of Madras against both the said decrees, which were heard together on the 19th March, 1926, by Venkatasubba Rao and Krishnan, JJ. There were two main points argued upon the appeals: (1) that the covenant was unenforcible for uncertainty, and (2) that the respondents not being in possession of or entitled to the premises demised by the lease could not claim specific performance either for the whole of the premises included in the lease or in respect of the acres 1.10 in their possession on the ground that there could not be specific performance of a part of the contract.

The learned Judges who delivered their judgments on the 10th December, 1926, were divided in their opinions. Venkatasubba Rao, J., agreed on both points with the District Judge, but Krishnan, J., was of opinion that the covenant of renewal was indivisible and could not be enforced. In view of this difference of opinion an order of reference of both appeals was made to the Chief Justice, who gave his opinion on both points in favour of the respondents, and decrees were made in both suits dismissing the appeals with costs, and against such decrees the present consolidated appeals have been preferred. The real point to be considered upon this appeal is whether the respondents can, under the circumstances, claim a renewal of the lease in respect of the small plot in their possession, the owners of the remainder of the demised premises not being parties to the suit or making any claim to such renewal. It is true that the respondents claimed in the alternative to get a renewal of the whole plot, but all the Judges in both Courts were of opinion, and in that opinion their Lordships concur, that any such claim was, under the circumstances existing at the termination of the lease, untenable, and, indeed, Mr. Justice Krishnan states that the respondents' counsel conceded that his clients could not enforce a renewal of the whole plot. There is no cross-appeal against the judgment on this point, and although the learned Counsel for the respondents at the hearing before this Board suggested that he might even then be permitted to present such an appeal, it is manifest that any such application could not be acceded to. Now the sole question of the claim for renewal

P. C.
The Secretary of State for India v. Volkart Brothers.
Lord Carson.

of the lease in respect of a part is one that depends on the construction of the covenant already quoted from the lease. What was the covenant? It was clearly a covenant to renew the lease in question: "then this lease shall and may be renewed, etc." That must mean the lease as a whole, including the subject-matter of the demise, which is the parcels as set out in the lease. Moreover, the lease is to be renewed "upon such terms and conditions as shall be judged reasonable"—a provision which is plainly applicable to the premises as a whole and might easily vary if applied to specific portions held under varying conditions and circumstances. It was strenuously argued by the learned Counsel for the respondents that as the lessees under the lease were entitled to assign portions of the premises the covenant for renewal would attach to each assignee holding his part in physical severalty, but no authority for such a proposition in a claim for specific performance has been cited before this Board. This argument was mainly attempted to be supported by a reference to covenants which run with the land, but, as observed by Krishnan, J.:

> "Cases bearing upon the apportionment of rent or referring to covenants for repairs are not, in my opinion, in point, as they are not *pari materia* with covenants to renew, which are covenants to create new rights."

The case mainly relied upon in the argument before us and dealt with in the Courts below was *Simpson* v. *Clayton*,[1] but that case does not appear to their Lordships to have any bearing. It was merely a suit by one assignee of a share of a sub-lease against the lessor, the mesne landlord, for damages for the breach of the latter's covenant to obtain a renewal without joining the owner of the other share. Their Lordships were referred in the course of the argument for the appellant to section 17 of the Specific Relief Act as showing that such Act forbids the enforcement by specific performance of a part of the contract to renew unless the case can be brought within sections 14, 15 or 16. Their Lordships, however, do not think that, in the view they have taken of the construction of the covenant for renewal, it is necessary to consider these sections. If, as their Lordships think, there is no contract to renew the lease for a part of the premises, it is quite clear that there is nothing in the Act referred to which can in any way assist

1. (1838) 8 L.J. (C.P.) 59.

the respondents, and, on the other hand, if the contract was for a renewal of a part, the Act could have no application.

Under the circumstances, their Lordships are of opinion that the appeals should be allowed, that the orders appealed from should be set aside, and that judgment for possession of the premises in question should be entered for the appellant with mesne profits from the 6th June, 1920, up to the date of the delivery of possession. The respondents must also pay the costs of the appeals and of the actions to the appellant. Their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellant: *Solicitor, India Office.*

Solicitors for respondents: *William A. Crump & Son.*

K.J.R. *Appeals allowed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD PARMOOR, LORD CARSON AND SIR LANCELOT SANDERSON.

Guran Ditta and another .. *Appellants** (*Defts.*)

v.

T. Ram Ditta .. *Respondent* (*Plff.*).

Civil Procedure Code (1908), *S* 110, *last clause—Substantial question of law—Meaning—Benami—Advancement—Presumption of—English and Indian Laws—Distinction—Bank—Fixed deposit in, by a person in name of himself and his wife "payable to either or survivor" of money belonging to him—Husband predeceasing wife—Ownership of money—Wife's right to—Hindu Law—Joint family—Partition—Partial partition—Rule—Exceptions.*

A substantial question of law, within the last clause of S. 110 of Civil Procedure Code, does not mean a substantial question of general importance, but a substantial question of law as between the parties in the case involved.

The general principle of equity, applicable both in this country and in India, is that in the case of a voluntary conveyance of property by a grantor, without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. An exception has, however, been made in English Law, and a gift to a wife is presumed, where money belonging to the husband is deposited at a Bank in the name of a wife, or, where a deposit is made in the joint names of both husband and wife This exception has not been

*P.C. Appeal No. 40 of 1927, 24th April, 1928.

P. C.

Guran Ditta
v.
Ram Ditta.

admitted in Indian Law, and there is, therefore, under it no presumption of an intended advancement.

Where, therefore, a Hindu opened a deposit account for a sum belonging to him with a Bank in the name of himself and his wife "payable to either or survivor," and a question arose after his death as to the ownership of the amount, *held*, that there was no presumption, in the deposit note, of an intended advancement in favour of the wife (the survivor) and that the sum and interest were the property of the husband, and remained at his disposal at the date of his death.

The ordinary rule undoubtedly is that there cannot be a partial partition.

Quære: Whether this rule is elastic, and can be departed from, if there is no inconvenience in a partial partition, apart from a final partition of the whole of the joint properties.

Appeal No. 40 of 1927, by special leave, from a judgment and decree, dated the 11th March, 1924, of the Court of the Judicial Commissioner of the North-West Frontier Province (Lieut.-Colonel J. Frizelle), affirming a decree of the Divisional Judge of Peshawar, dated the 18th December, 1922.

For purposes of the present report, the material facts of the case are sufficiently stated in their Lordships' judgment.

Dunne, K. C. and *Wallach* for appellants.

De Gruyther, K. C. and *Parikh* for respondent.

24th April, 1928. The judgment of their Lordships was delivered by

Lord Parmoor.

LORD PARMOOR.—This is an appeal, by special leave, from a decree of the Court of the Judicial Commissioner of the North-West Frontier Province, affirming a decree of the Divisional Judge at Peshawar.

The respondent is the eldest son of Teku Ram, who died on the 20th May, 1920. The appellant, Guran Ditta, is a son, and the appellant, Mussammat Gujri, is the widow of the said Teku Ram. Teku Ram, on the 17th May, 1919, opened a deposit account for Rs. 1,00,000 with the Peshawar Branch of the Alliance Bank of Simla, in the name of himself and his wife, "payable to either or survivor." The receipt of the Bank was dated the 24th May, in the following terms: "Received from L. Teku Ram, house proprietor, and his wife, Bibi Gujri, payable to either or survivor, Rupees one lakh only, as a deposit, bearing interest at 5½ per cent. per annum, requiring twelve months' notice of withdrawal and subject to the general rules of the Bank with respect to such deposit." A notice of withdrawal was given when the account was opened as follows:

"Notice given this 17th day of May 1919 as on the 24th April, 1919."

After the death of Teku Ram, the deposit was renewed for a further period of one year in the name of Mussammat Gujri alone. On the 14th May, 1921, Mussammat Gujri wrote requesting the Bank to pay to Guran Ditta, the bearer of the letter, "my deposit of Rs. 1,00,000 (Rupees one lakh), together with the arrears of the interest on it due to me." In accordance with these instructions, the principal and interest of the deposit were paid to Guran Ditta.

On the 20th August, 1921, the respondent instituted his suit in the Court of the District Judge of Peshawar against the appellants and a younger brother, who is not a party to this appeal. Several questions arose for decision in the Courts below. A preliminary issue, "Does the suit lie in its present form?" was decided in both Courts in favour of the respondent, and will be referred to later. Issues were framed by the Divisional Judge of Peshawar, and re-stated by the Divisional Judge, as follows:—

(1)) Was the deposit the sole property of Mussammat Gujri by gift, will or otherwise?

(2) Did Teku Ram leave any subsisting will?

(3) If so, was such will valid so far as it dealt with joint-family property?

(4) To what relief is plaintiff entitled and against whom?

After full enquiry, and much conflicting evidence, both Courts have found, as a question of fact, that Teku Ram did not leave any subsisting will. There was no attempt in the argument before their Lordships to reverse this concurrent finding of the two Courts below on a question of fact. This issue having been decided in the negative, the third issue became no longer material.

The main issue decided in the Courts below, and which was relied on in the application for special leave to appeal, was whether the sum deposited became the sole property of Mussammat Gujri by gift. On the application for special leave to this Board, it was urged that the question whether a fixed deposit in a Bank in the name of two persons payable to either or survivor was in fact payable to the survivor, or belonged to the estate of the person who originally supplied the money, was a substantial question of law, and of great importance to Banks in India, and to persons in whose names such deposits had been made. It appears from the

P. C.
Guran Ditta
v.
Ram Ditta.
Lord
Parmoor.

record that this was the only question raised when special leave to appeal was granted.

The money deposited in the Bank was at the time of deposit the property of Teku Ram. The Courts below decided that this money belonged to the estate of Teku Ram, as the person who originally supplied the money. The money in dispute being upwards of Rs. 10,000, the appellants applied to the Judicial Commissioner for leave to appeal on the ground that there was a substantial question of law involved, bringing the application within the terms of section 110 of the Code of Civil Procedure, 1908:

"Where the decree or final order, appealed from, affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law"

In the case of *Raghunath Prasad Singh* v. *Deputy Commissioner of Partabgarh* [1] it was held that a substantial question of law, within the last clause of section 110 of the Code of Civil Procedure, does not mean a substantial question of general importance, but a substantial question of law as between the parties in the case involved. The leave to appeal was refused, but, as stated above, special leave to appeal was granted on the petition to the Board.

In the argument before their Lordships, and in the Courts below, it was admitted that the money deposited belonged to Teku Ram, who had supplied it from his own resources, by a transfer from his current account at the Bank. It was argued on behalf of the appellants that, apart from outside evidence, there was a presumption that the sum deposited constituted an advancement, or resulting trust, in favour of Mussammat Gujri, the wife of Teku Ram. It was said that one of the provisions of the destroyed will of Teku Ram was evidence that it was the intention of Teku Ram to make an advancement in favour of his wife under the terms of the deposit note; but in the opinion of their Lordships no weight should be attached to this evidence. They agree in this respect with the views expressed in the judgments of the Divisional Judge at Peshawar and of the Judicial Commissioner of the North-West Frontier Province.

The question, therefore, to be decided is the construction of the terms of the deposit note.

The general principle of equity, applicable both in this country and in India, is that in the case of a voluntary conveyance

1. (1927) L.R. 54 I.A. 126.

P. C.

Guran Ditta v. Ram Ditta.

Lord Parmoor.

of property by a grantor, without any declaration of trust, there is a resulting trust in favour of the grantor, unless it can be proved that an actual gift was intended. An exception has, however, been made in English law, and a gift to a wife is presumed, where money belonging to the husband is deposited at a Bank in the name of a wife, or, where a deposit is made, in the joint names of both husband and wife.

This exception has not been admitted in Indian law under the different conditions which attach to family life, and where the social relationships are of an essentially different character. The principle to be applied has been stated in *Kerwick* v. *Kerwick*[2]:

"The general rule and principle of the Indian Law as to resulting trusts differs but little, if at all, from the general rule of English Law upon the same subject, but in their Lordships' view it has been established by the decisions in the case of *Gopeekrist* v. *Gungapersaud* [(1854) 6 Moo. I.A. 53] and *Ushur Ali* v. *Bebee Ultaf Fatima* [(1869) 13 Moo. I.A. 232] that owing to the widespread and persistent practice which prevails amongst the natives of India, whether Mahomedan or Hindu, for owners of property to make grants and transfers of it *benami* for no obvious reason or apparent purpose, without the slightest intention of vesting in the donee any beneficial interest in the property granted or transferred, as well as the usages which these natives have adopted and which have been protected by Statute, no exception has ever been engrafted on the general law of India negativing the presumption of the resulting trust in favour of the person providing the purchase money, such as has, by the Courts of Chancery in the exercise of their equitable jurisdiction, been engrafted on the corresponding law in England in those cases where a husband or father pays the money and the purchase is taken in the name of a wife or child. In such a case there is, under the general law in India, no presumption of an intended advancement as there is in England."

Applying the principle thus stated to the present case, their Lordships hold that there is no presumption, in the deposit note, of an intended advancement in favour of Mussammat Gujri, and that the sum of Rs. 1,00,000, and interest, were the property of Teku Ram, and remained at his disposal at the date of his death, as found in the decisions of the Courts below.

On this issue—the substantial question of law on which special leave to appeal was asked for, and granted—their Lordships will humbly advise His Majesty that the decision of the Courts below was right, and should be confirmed.

Their Lordships have considered the objections to the form of suit, and the difficulties which arise in a decree which necessi-

2. (1920) L.R. 47 I.A. 275: 39 M.L.J. 296 (P.C.).

P. C.

Guran Ditta v. Ram Ditta.

Lord Parmoor.

tates the partial partition of the estate of Teku Ram. The ordinary rule undoubtedly is that there cannot be a partial partition, but it has been held in the Courts below that this rule is elastic, and has in several cases been departed from, if there is no inconvenience in a partial partition, apart from a final partition of the whole of the joint properties. The Courts further held that in this case no inconvenience would arise. Accordingly, it was ordered "that the plaintiff—the respondent—be, and the same is hereby given, a decree for Rs. 37,368 with costs accordingly against Guran Ditta and Mussammat Gujri, defendants, jointly and severally." It is stated in the judgment of the Additional Judicial Commissioner of the North-West Frontier Province that the question of the rights of the widow to maintenance from the rest of her husband's property would be decided separately, and their Lordships were informed that a suit for a final partition of the whole property of Teku Ram had been instituted and was in process of decision. Their Lordships do not think it necessary to decide any general question of procedure, but are of opinion that, in this case, justice could be done between the parties without entering upon any question of partial partition, and leaving open all further questions for determination in the final partition of the whole property. Their Lordships propose, therefore, to vary the decree by limiting it to a declaration, in answer in the first issue, that the deposit in suit was not the sole property of Mussammat Gujri, by gift, will or otherwise, and that the respondent is entitled, as against the appellants, to a declaration to this effect.

The appellants have failed in the main issue involved, and their Lordships will humbly advise His Majesty that, subject to alteration in the form of the decree, the judgments below should be confirmed and this appeal dismissed with costs.

Solicitor for appellants: *H. S. L. Polak.*

Solicitors for respondent: *T. L. Wilson & Co.*

K.J.R. *Appeal allowed in part.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

In Insolvency.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

In the matter of V. Purushothamdoss & Brothers.*

In the matter of V. Purushothamdoss & Brothers.

Insolvency—Preference of some creditors to others—Agreement by Official Assignee securing—Validity—Sanction of such agreement—Jurisdiction of Insolvency Court—Presidency Towns Insolvency Act, S. 49 (5)—Contract Act, S. 23.

The policy of the Bankruptcy Law is to treat all creditors alike. The Official Assignee, in the administration of the insolvent's estate, cannot on any account prefer one creditor to another, and the Court cannot aid him in doing that which is prohibited to be done by him directly.

Some of the creditors of an insolvent's estate agreed to supply the Official Assignee with a sum required to be deposited by him into Court as security for the costs of a suit which had been instituted by the insolvent prior to his presenting the insolvency petition and which the Official Assignee was allowed to continue on condition of his furnishing security for costs. Those creditors, however, made it a condition of their supplying him wtih the said amount that out of the sum, if any, recovered in the said suit their debts should be paid in full first and that the other creditors should be paid only from, and out of, any balance that might be left.

On an application made by the Official Assignee to the Insolvency Court for its sanction of that agreement, *held,* that the agreement was contrary to public policy and that it could not be sanctioned by the Court, notwithstanding that it would in no event prejudice the other creditors, while it might, if there was a balance left, benefit them.

The Official Assignee of Madras, applicant in person.

K. Krishnaswami Aiyangar instructed by *P. Balasubramaniam* for K. Govardhandoss, creditor No. 1.

K. S. Krishnaswami Aiyangar instructed by *S. Rajamanickam* for the opposing creditor No. 28, Balakrishna Sarma.

N. T. Shamanna for creditor No. 26, Goculdoss and Jumnadoss and Company.

The Court delivered the following

JUDGMENT.—This application raises a point of some importance. It is made by the Official Assignee under the Presidency Towns Insolvency Act. Previous to his presenting the insolvency petition, the insolvent had filed a suit on the Original Side for the recovery of nearly 7 lakhs of rupees. On the plaintiff's insolvency, the Official Assignee intimated his willingness to continue the suit and was directed, under Order 22, Rule 8,

*I.P. No. 241 of 1927. 18th November, 1927.

In the matter of V. Purushothamdoss & Brothers.

Civil Procedure Code, to furnish security for costs. The Official Assignee has not been able to raise the money in the usual way and has now placed before me a scheme for my approval. If that scheme is approved, he will be in a position to raise Rs. 6,000, the amount to be deposited in Court on the Original Side, as security. The scheme is shortly this. The liabilities of the insolvent amount to nearly 4 lakhs of rupees. Four creditors to whom an aggregate amount of about Rs. 46,000 is due have come forward with a proposal to advance to the Official Assignee Rs. 6,000 and as a condition of their lending the sum, they stipulate that if any amount is recovered by reason of the suit, they shall be paid their debts in priority and that the other creditors shall be paid only from, and out of, any balance remaining after payment in full of their debts. This scheme I am asked to approve. The application is opposed by several creditors on whose behalf it is contended that the proposed agreement is inconsistent with the policy of the Insolvency Act and is unlawful under section 23 of the Indian Contract Act. The Official Assignee puts his case thus:

"The asset valued at nearly 7 lakhs becomes a worthless one if I fail to furnish security. By the agreement I propose to enter into, the position of the dissenting creditors may become better and it can in no case become worse. If I lose the suit, they are in no worse position; if I win it, there is every chance of their being paid their debts in full or in part. If I recover only a sum which represents the aggregate of the debt due to the four assenting creditors, they alone will no doubt be benefited, but that does not in any manner injure the other creditors. In no event can the arrangement be, therefore, prejudicial to the body of the creditors whom I represent."

Broadly speaking, this is true, but the question, however, remains, is this an agreement which the Court can approve? Section 49 of the Insolvency Act deals with priority of certain debts, such as debts due to the Crown. The section enacts that the debts to which priority applies shall be paid in full if possible. It is then provided in sub-section (5):

"Subject to the provisions of this Act, all debts proved in insolvency shall be paid rateably according to the amounts of such debts respectively and without any preference."

The Indian Act is modelled on the English Bankruptcy Act and similar provisions are contained in section 33 of that Act. The sub-section reads thus—"subject to the provisions of this Act, all debts proved in bankruptcy shall be paid *pari passu*."

The section of our Act is, if possible, stronger than the corresponding section of the English Act, although I have no

In the matter of V. Purushothamdoss & Brothers.

doubt that the Legislature intended merely to copy the English rule. The word *pari passu* connotes that the payment shall be rateable and the section of our Act would have been complete even without the words "without any preference" added at the end. The presence of these words makes the matter perfectly clear and it is impossible to hold that the Official Assignee, in the administration of the insolvent's estate, can on any account prefer one creditor to another. Can the Official Assignee ask the Court to approve what is prohibited to be done by him *directly*? The policy of the Bankruptcy Laws seems to be to treat all creditors alike. It is based on grounds of public policy and the Official Assignee cannot contravene the rule in question, much less can the Court aid him in contravening that rule. Under section 23 of the Contract Act, any agreement is unlawful which, if permitted, would defeat the provisions of any law or which is opposed to public policy. There are decided cases which have held agreements invalid on the ground that they are inconsistent with the policy of the Insolvency Act. The Official Assignee has frankly told me that this application is of a very novel kind, and, as may be expected, there is very little case-law on the point. There is, however, one case decided under the English Act which is directly in point.

A German national resident in England was adjudicated a bankrupt and the custodian of enemy assets agreed to release an asset of the bankrupt, stipulating that such release should only operate in favour of creditors of British nationality and the trustee applied to the Court for directions. Lawrence, J., expressed the view that the Court had no power to direct a distribution among a limited class of creditors only. *Re Wiskemann.*[1]

The Official Assignee has expressly said that he does not rely upon there having been proper meeting of creditors and upon the scheme having been accepted at such a meeting. But it seems to me that the question is independent of the approval of creditors. There are several sections in the Insolvency Act which show that the assent of those affected is disregarded on grounds of public policy or commercial morality, *e.g.*, sections dealing with an insolvent's discharge and compositions with creditors. The fact that the Official Assignee himself has approved makes little difference. *See* Williams on Bankruptcy, 13th

1. (1923) 92 L.J. (Ch.) 349.

In the matter of V. Purushothamdoss & Brothers.

Ed. p. 87. I have come to the conclusion that this is a scheme which I cannot sanction.

There is yet one observation I have to make. The Official Assignee asks me to regard the scheme as one providing for remuneration to the four assenting creditors who have agreed to lend the money and not as embodying a method of preference. What he says is, that there is nothing to prevent the lenders from stipulating that in return for the Rs. 6,000 they advance, they shall receive Rs. 48,000 in a certain event. This may, or may not, be so, but I am not called upon at present to decide whether or not such an agreement is valid and can receive the approval of the Court. The question I have to ask myself is, what does the transaction in substance and effect amount to? There can be no possible doubt that the arrangement is one which is intended to, and which does in fact, give preference to these four creditors in the payment of their debts. The report of the Official Assignee itself goes a long way to show what his own view of the transaction was. He says in clear and unmistakeable terms that the object aimed at was to give priority to the debts of the creditors in question. Not only has he said this in his report, but he has argued the application only on that footing, although he now suggests that it is possible to put a different construction upon the scheme. This argument is, therefore, clearly untenable and I must refuse to accept the scheme. The application is rejected.

The application of the Official Assignee is *bona fide* and I do not propose to direct him to pay costs personally, but the taxed costs of Gokuldoss Jumnadoss and Company and Balakrishna Sarma shall be paid by him from, and out of, the estate. I certify for counsel for Balakrishna Sarma. These costs shall have priority over the claims of creditors.

A.S.V. *Application rejected.*

[This judgment has been confirmed in O.S.A. No. 100 of 1927 by their Lordships The Chief Justice and Pakenham Walsh, J., on 13th September, 1928.—REP.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE JACKSON.

Machanjeeri Ahmed .. *Petitioner** (*Deft.*)

v.

K. Govinda Prabhu .. *Respondent* (*Plff.*).

Machanjeeri Ahmed *v.* Govinda Prabhu.

Provincial Insolvency Act (V of 1920), S. 78—Suit against insolvent during the pendency of insolveny proceedings—Plaintiff whether entitled to exclude the period of the pendency of insolvency proceedings.

A person who brings a suit against an insolvent during the pendency of the insolvency proceedings is not entitled to the benefit of section 78 of the Provincial Insolvency Act; the benefit of this section can only be invoked by a party who wants to proceed against an insolvent after the adjudication has been annulled.

In re Benson. Bower v. *Chetwynd,* (1914) 2 Ch. 68 referred to.

Petition under section 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the Subordinate Judge of South Malabar at Calicut in S.C. No. 732 of 1926.

K. P. Ramakrishna Aiyar for petitioner.

K. Kuttikrishna Menon for respondent.

The judgment of the Court was delivered by

Devadoss, J.—This is an application to revise the decree of the Subordinate Judge in Small Cause No. 732 of 1926. The contention for the petitioner is that the suit is barred by limitation and that section 78 of the Provincial Insolvency Act does not apply to this case. The Subordinate Judge held that the suit was not barred inasmuch as the insolvency proceedings were pending at the time of the suit. The question is whether a person who brings a suit against an insolvent during the pendency of the insolvency proceedings is entitled to the benefit of section 78. Section 78 says:

"Where an order of adjudication has been annulled under this Act, in computing the period of limitation prescribed for any suit or application for the execution of a decree (other than a suit or application in respect of which the leave of the Court was obtained under sub-section (2) of section 28) which might have been brought or made but for the making of an order of adjudication under this Act, the period from the date of the order of adjudication to the date of the order of annulment shall be excluded."

The benefit of S. 78 can only be invoked by a party who wants to proceed against an insolvent after the adjudication

*C.R.P. No. 843 of 1927. 14th March, 1928

Machanjeeri Ahmed v. Govinda Prabhu.

Devadoss, J.

has been annulled. It does not say anything about the proceedings during the pendency of the insolvency proceedings. Section 28 (2) of the Act says:

"No creditor to whom the insolvent is indebted in respect of any debt proveable under this Act shall during the pendency of the insolvency proceedings have any remedy against the property of the insolvent in respect of the debt, or commence any suit or other legal proceeding except with the leave of the Court on such terms as the Court may impose."

When a debtor is adjudicated insolvent the creditor is not entitled to proceed against him except with the leave of the Court. This does not entitle the plaintiff to come years after the order of adjudication is made and file a suit against the insolvent in the ordinary Court and claim the benefit of section 78. So long as the insolvency proceedings are pending, the period of limitation is suspended, provided the claim was not barred on the day of adjudication, and if the order of adjudication is annulled, the right to proceed against the insolvent would revive and the period during which the insolvency proceedings were pending would be excluded if the person wishes to proceed against the insolvent or his property. The case in *In re Benson. Bower* v. *Chetwynd*[1] is a clear authority for the position that a person who wants to sue in the ordinary Courts for relief against an insolvent cannot claim the benefit of S. 78. As observed by Channell, J.:

"A debt does not become barred by lapse of time if it was not so barred at the commencement of the bankruptcy, and of this there can be no doubt, but this is only in the bankruptcy."

This decision was followed in *Ramaswami Pillai* v. *Govindaswami Naicker*.[2] The same view was held in *Sidhraj Bhojraj* v. *Alli Haji*.[3]

We hold that the plaintiff is not entitled to exclude the time during which insolvency proceedings were pending because they have not yet been annulled.

We allow this Civil Revision Petition with costs and at the same time allow the respondent to withdraw the suit with liberty to bring a fresh suit if so advised.

N.S. *Petition allowed.*

---

1 (1914) 2 Ch 68.
2. (1918) I.L.R. 42 M. 319: 36 M.L.J. 104.
3. (1922) I.L.R. 47 B. 244.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE ODGERS.

The East India Distilleries and Factories, Limited, through their Managing Agents Messrs. Parry & Co. .. *Appellants* (Defts.)*

v.

P. F. Mathias .. *Respondent (Plff.)*.

The East India Distilleries and Factories, Limited *v.* P. F. Mathias.

Transfer of Property Act, S. 108 (*m*)—*Fire—Destruction of demised premises by—Reinstatement of—Lessee's liability for—Covenant express providing for—Necessity—English Law—Distinction—Covenant not so providing—Construction of lease—Liability of lessee in case of—Negligence—Proof of—Necessity.*

The defendant company took a lease of a building from the plaintiff for the purpose of storing alcohol and other spirits for the purpose of their distilling business. The lease contained a covenant "that the lessees on the expiry of the period of this lease . . . . should restore the building at their own cost to the condition in which they took the same on lease from V, the predecessor-in-title of the lessor. . . . . That in case the lessees fail to remove the additions and alterations made by them to suit their purposes and at their costs and fail to restore the building to the original and habitable condition the cost thereof . . . . shall be paid by the lessees to the lessor." The defendant to the knowledge of the plaintiff made internal structural alterations in the building to suit their own purposes for use as a liquor warehouse. The building was subsequently burnt down, and the plaintiff sued the defendant for damages for reinstatement of the building.

Held, that the plaintiff was not entitled to recover because he did not bring home negligence to the defendant company.

In India S. 108 of the Transfer of Property Act clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has definitely taken that burden upon his shoulders by his covenant. The covenant in the lease in question did not contemplate the case of fire at all It merely provided for the obligation that the lessee would incur in restoring premises which he had altered to suit his own purposes to their original use as a dwelling house at the termination of the lease The principle of *Rylands* v. *Fletcher* [(1868) L R. 3 H.L. 330] is inapplicable to the case, because (1) there was no evidence that proof alcohol was a dangerous thing which a man could reasonably be held to store at his peril owing to its dangerous nature, and (2) the lessor knew from the beginning for what purposes the lessees required the building and to what use they proposed to put it.

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in Original Suit No. 19 of 1923.

*Appeal No. 432 of 1925. 3rd May, 1928.

The East India Distilleries and Factories, Limited v. P. F. Mathias.

Coutts Trotter, C. J.

Vere Mockett instructed by *Messrs. King* and *Partridge* for appellants.

K. S. Krishnaswami Aiyangar for *A. T. Coelho* and *C. M. J. Ernest* for respondent.

The Court delivered the following

JUDGMENTS. *Coutts Trotter, C. J.*—After careful consideration of this case I have come to the conclusion that the plaintiff cannot succeed unless he can bring home negligence to the defendants. It is argued that the covenant in the lease imposes an absolute obligation on the lessees to restore the building at the end of their term in the condition in which they took it without regard to the provisions of section 108, Transfer of Property Act. That such a result might be reached in England I do not contest. English authorities were quoted and there is no doubt much to be said for the view that, if you enter into a general repairing covenant and do not provide for the contingency of fire, you will be held strictly to the words of your covenant. But in India the section 108 of the Transfer of Property Act clearly contemplates that a lessee should not be responsible for the consequences of fire unless he has definitely taken that burden upon his shoulders by his covenant. In my opinion the material covenant of this lease did not contemplate the case of fire at all. It merely provided for the obligation that the lessee would incur in restoring premises which he had altered to suit his own purposes to their original use as a dwelling house at the termination of the lease. That covenant to my mind was founded upon the basis that at the termination of the lease the premises should exist in a state capable of conversion and never was meant to impose upon the lessees the obligation of re-building what had in the events that happened become a mere heap of burnt out ashes.

With regard to the question of negligence which of course, if established, would prove the plaintiff's case, I do not think it is established. It is quite true that there was no watchman so far as one can ascertain on this night, but I am entirely unable to gather from the evidence that that can be in any way regarded as the proximate cause of this fire. Nor can I see that the principle of *Rylands* v. *Fletcher*[1] has any application to a case of this kind for two reasons. In the first place, there is no evidence whatever that proof alcohol is a dangerous thing which a man can reasonably be held to store at his peril owing

1. (1868) L.R. 3 H.L. 330.

The East India Distilleries and Factories, Limited v. P.F. Mathias.

Coutts Trotter, C. J.

to its dangerous nature. It is not apparently liable to spontaneous combustion in any circumstances and it seems more likely on the evidence and from what we have been told that the building fired the alcohol than that the alcohol fired the building. Moreover it was from the beginning known to the lessors for what purpose the lessees required the building and to what use they proposed to put it. The cases relied upon by the plaintiffs appear to me not to rest upon the doctrine in *Rylands* v. *Fletcher*,[1] but to be based upon negligence. I need only refer to the latest cases relied upon. The earlier are too well known to render it necessary to discuss them again. Such cases I mean as *Scott* v. *The London and St. Catherine Docks Co.*[2] and *Smith* v. *London and South Western Railway Co.*[3] I confess that the case that has given me most difficulty is that of *Musgrove* v. *Pandelis*[4] which was put before us as being an instance of the application of the doctrine of *Rylands* v. *Fletcher*.[1] I have satisfied myself after analysing it carefully and especially having regard to the judgment of Duke, L. J., that the case ultimately resolves itself into a finding of negligence against the defendant's servant. Conditions of danger were no doubt present, but the determining factor was the failure of the defendant's servant who was an unskilled person put in charge of a car (in itself, I think, possibly a negligent employment by him) to turn off the tap and hence the petrol in the carburetter was ignited. Since writing this I have seen that Sir Frederick Pollock takes the same view of the scope of the decision in the last edition of his well-known book on Torts. The other recent case was that reported in *Mulchand Nemi Chand* v. *Basdeo Ram Sarup*,[5] which clearly contains a finding that it was negligent to leave cotton bales in the place where they were left without ventilation and without inspection.

In my opinion there is no evidence of negligence here or at any rate of negligence which had any casual connection with the fire. I think the appeal must be allowed with costs here and below. The memorandum of objection is dismissed with costs.

Odgers, J.

Odgers, J.—This is an appeal by the East India Distilleries and Sugar Factories, Limited, through their Managing Agents, Messrs. Parry & Co., against the decree of the Subordinate Judge of South Kanara awarding the plaintiff one P. F. Mathias Rs. 4,400 damages. The appellant company had taken a

1. (1868) L.R. 3 H.L. 330.
2. (1865) 3 H. & C. 596: 159 E.R. 665.
3. (1870) L.R. 5 C. P. 98 and 6 C.P.
4. (1919) 2 K.B. 43.
5. (1926) I.L.R. 48 A. 404.

The East India Distilleries and Factories, Limited v. P. F. Mathias.

Odgers, J.

lease from the plaintiff for the purpose of storing alcohol and other spirits for the purpose of their distilling business. They had apparently leased the premises since the beginning of 1916 when they were to occupy for three years at a monthly rental of Rs. 40. The lessees held over on 23rd July 1920, and obtained a renewal for a further term of three years from 1st June, 1920 at a monthly rental of Rs. 50. The defendant to the knowledge of the plaintiff made internal structural alterations in the buildings to suit their own purposes for use as a liquor warehouse. On the 27th May, 1922 this building was burnt down, and the plaintiff seeks to hold the defendant company liable for reinstatement. The learned Subordinate Judge has held that the fire was occasioned by the negligence of the defendants and also that by the terms of the lease the defendants had bound themselves to restore the building undamaged and in good condition to the plaintiff. The first lease is Ex. XIV for a period of three years from the 1st April, 1910, the owner then being Mr. N. Vyasa Rao, and the lease in question is Ex. XIII in which the lessor undertakes to effect certain preliminary repairs.

The important covenant is as follows:—

"That the lessees on the expiry of the period of this lease or on its sooner determination the lessees shall restore the building at their own cost to the condition in which they took the same on lease from Mr. Vyasa Rao, the predecessor-in-title of the lessor in the beginning and as described in the plan which is hereto appended and in good and proper condition and allowance being made for all reasonable wear and tear. That in case the lessees fail to remove the additions and alterations made by them to suit their purposes and at their costs and fail to restore the building to the original and habitable condition the cost thereof be estimated by a competent person and shall be paid by the lessees to the lessor."

The question is whether the words in this covenant "the lessees shall restore the building at their own cost to the condition in which they took the same on lease from Mr. Vyasa Rao" oblige them to re-build in the case of destruction by fire; in other words, was it within the contemplation of the parties that the benefit of the Transfer of Property Act, section 108 (*e*) should be replaced by this special contract. Sub-section (*m*) of this section is also important, for "the lessee is to restore on the termination of the lease the property in as good condition as it was at the time he was put in possession subject to changes caused by reasonable wear and tear . . . . and when such defect has been caused by any act or default on the

part of the lessee, his servants or agents, is bound to make it good within three months, etc."

It appears to me that what was in the contemplation of the parties when they entered into this covenant set out above in the lease was that any structural alterations made by the company for the purposes of their business should be removed and the building should be restored on the termination of the lease so as to be in a good condition for occupation as a dwelling house which it apparently was before the company began to occupy. For instance, in the lease of 1915, between these same parties the lessees covenant at the end of the lease to put the lessor in possession having before the expiry of that period removed all additions and alterations "made by us in the above premises for our purposes and make at our expense all necessary changes and repairs for the complete restoration of the premises to the original condition in which the premises were when they were first leased to us by our predecessor-in-title Mr. Vyasa Rao."

It seems to me, therefore, that although the words of the covenant might be stretched so as to cover the present circumstances they cannot reasonably be so applied, for, among other reasons, the fact that in the same sentence the lessees undertake to restore the buildings in good and proper condition allowance being made for all reasonable wear and tear; that cannot possibly refer to the complete destruction of the building during the lease and its complete reinstatement. Some point was made on the English Law. For instance, Woodfall on Landlord and Tenant, page 732 is referred to, to the effect that a tenant must re-build the premises if burnt down provided he had covenanted to repair and keep in repair and there is no exception as to damage by fire. The answer, I think, to this is that by the Indian Law, Transfer of Property Act, under section 108 (*e*) the exception as to damage by fire is indicated in favour of the lessee provided the fire be not caused by his negligence. As to this the learned Subordinate Judge comes to the conclusion that the fire was caused by the negligence of the lessees in that they failed to employ a watchman on the night in question. Apparently a watchman was generally employed, but there was no regular watchman round about the time of the fire but coolies were deputed in turn to do the duty. On the night in question the cooly appointed, after locking the warehouse at 6-30 P.M., was allowed to go home. It appears that two locks are placed upon the building and the three inner doors are bolted from the inside. The outer door was locked

The East India Distilleries and Factories, Limited v. P. F. Mathias.

Odgers, J.

by Mr. Lobo, D.W. 2 and also by the Warehouse Officer with a Government lock. The witness says he deputed a cooly to watch on the night in question. The learned Subordinate Judge lays great stress on the fact that one witness, Somayya, who was passing on his way from a bioscope performance at 11 P.M. on the night in question, says that one of the outer doors of the bungalow was open and he was consequently able to see the fire burning inside. So that on this evidence the learned Subordinate Judge says that the only alternatives are either that the servants of the company deliberately omitted to bolt the doors and, therefore, allowed "the intruder or intruders" to enter the building, or these persons entered by removing the tiles of the roof. It has to be pointed out there is no evidence whatever of anybody having entered the building or of having set fire to it. But the learned Subordinate Judge considers that an intruder must have so entered and that he would not have so entered had the watchman been on duty. Under the circumstances, I cannot see that there is any relation of cause and effect between the absence of the watchman and the occurrence of the fire. It may be that somebody had during the day or afternoon left some lighted substance in the building and that caused the fire break out in the middle of the night. As to the facts spoken to by Somayya of the door being open D.W. 2 says that after the fire he found both locks in tact but the door had been burnt through. It may be that it was this burning of the door that enabled P.W. 1 Somayya to see the fire inside and that this was the cause of the door being open. The learned Judge further finds that the destruction by fire was rendered *possible* by the defendant's default in not appointing a regular watchman. I may point out that that finding is not sufficient to mulct the defendant company in damages. It must be found that the failure to provide a watchman was the proximate cause of the fire. Before going further one perhaps ought to refer to an authority quoted on this question of covenant, *J. H. Hechle* v. *S. J. Tellery*,[6] where the lessee was held liable to make good damage caused to the leased premises by the Calcutta earthquake of 1897. There the lessee had covenanted without restriction or exception "to keep the premises wind and watertight and in habitable condition," and that being so the learned Judges were of the opinion that this was a contract to the contrary and that section 108, clause (*m*) of the Transfer of Property Act did not apply. The

6. (1900) 4 C.W.N. 521.

The East India Distilleries and Factories, Limited v. P. F. Mathias. Odgers, J.

facts of that case are in my opinion distinguishable from the present.

The other ground on which it is sought to make the company liable is that of negligence. Mr. K. S. Krishnaswami Aiyangar even went as far as to suggest that the principle of *Fletcher* v. *Rylands*[1] ought to be applied to the present case. I am not aware of any authority upon which one would be justified in holding that spirits, even proof alcohol, are dangerous things which have to be "kept in" at a man's own peril, and an analogy was sought in the common law rule "as to 'keeping in' fire." For instance, Rolle says:

"If a fire suddenly light in my house, I knowing nothing of it, and it burnt my goods and also the house of my neighbour an action on the case lies against me by him."

The common law rule has been more than once altered by statute and I think it will be found that most of the modern cases as to fire have turned on the question of negligence, though the Act of George III (Metropolitan Building Act) does not protect a person who brings upon his premises an object calculated to do damage if not kept under control.[3] It was sought to liken this case to that of the motor car case, *Musgrove* v. *Pandelis*.[4] There the defence was that the fire had accidentally begun under the Fire Prevention (Metropolis) Act, 1774. But it was held that the fire that caused the damage to the plaintiff's premises was not that which took place in the carburetter but was the fire which spread to the car, and that this fire did not begin accidentally but was caused by the negligence of the defendant's servant who did not turn off the petrol tap; if he had done so the fire would have burnt itself out harmlessly. That again is a case of negligence. So is the case in *Mulchand Nemi Chand* v. *Basdeo Ram Sarup*[5] where it was held that the fire to the cotton would not have happened had the defendants exercised proper watchfulness and control over it. It is even sought to hold the defendants liable on the doctrine of *res ipsa loquitur*, such as the bag of flour case, *Scott* v. *The London and St. Catherine Docks Co.*[2] and under which may perhaps be included *Smith* v. *London and South-Western Railway Co.*,[7] fire caused by sparks which escaped from an engine. But it is very difficult to see how the de-

2. (1865) 3 H. & C. 596: 159 E.R. 665. 3. (1870) L.R. 6 C.P. 14.
4. (1919) 2 K.B. 43. 5. (1926) I.L.R. 48 A. 404.
7. (1866) L.R. 1 Ex. 265.

The East India Distilleries and Factories, Limited v. P. F. Mathias.

Odgers, J.

fendant can be made liable in a case like this on this doctrine. Why these persons who to the knowledge of the plaintiffs were storing alcohol in their warehouse should have a special onus of responsibility heavier than that resting on an ordinary lessee is very difficult to understand in the absence of any special contract between the parties to this effect. There is no evidence that this is a dangerous trade or the storage of these things is a risky or dangerous act. In the case of *Scott* v. *London and St. Catherine Docks Co.*[2] where a bag of flour fell from a window of the defendant's warehouse, there was evidence that *prima facie* the bag which fell was under the plaintiff's control and they had a primary duty to keep it from falling on to the heads of the public passing in the streets. So in the sparks from the engine case, the fire was proximately caused by the sparks setting fire to the dry grass lying on the banks of the Railway cutting. This fire spread and eventually attacked the defendant's thatched house. There was some evidence of negligence there in the Railway Company allowing the dry grass to lie on the bank. So in *Attorney-General* v. *Cory Bros. & Co.*[8] where the land slide in question was held due to the negligence of the company in depositing the spoil on the hillside without draining the site of the tips.

In the absence then of any evidence of negligence on the part of the company (for I have already stated that the absence of watchman cannot in any way be held to be proximate cause of the fire) it seems to me that the plaintiff has not succeeded in proving that he is entitled to damages at the hands of the defendants. I think, therefore, that the judgment of the learned Judge was wrong and that the appeal must be allowed with costs both here and below.

The memorandum of objection has not been argued and must be dismissed with costs.

A.S.V. *Appeal allowed. Memo. of Objection dismissed.*

---

2. (1865) 3 H. & C. 596 : 159 E.R. 665.
8. (1921) 1 App. Cas. 521.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Messrs. Goculdoss Jumnadoss & Co. and another .. *Petitioners** (*Respts.*)

v.

N. M. Sadasivier and others .. *Respondents* (*Petnrs.*).

Messrs. Goculdoss Jumnadoss & Co. v. Sadasivier.

Insolvency petition—Transfer of, from file of Sub-Court to Original Side of High Court—Application for—Maintainability—Civil Procedure Code, S. 24—Letters Patent, clauses 13 *and* 18.

Held, that an application to withdraw an insolvency petition from the file of a Sub-Court and transfer it for trial and disposal to the Original Side of the High Court was not maintainable either under S. 24, Civil Procedure Code or under the Letters Patent.

The Original Side of the High Court sitting in the Insolvency is not a Court subordinate to the High Court in its appellate jurisdiction. And the High Court cannot in the exercise of its Original Insolvency Jurisdiction apply the Provincial Insolvency Act.

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to withdraw I.P. No. 100 of 1927 on the file of the Court of the Subordinate Judge of Madura and transfer the same for trial and disposal by the Presidency Towns Insolvency Court.

O. Thanikachala Chettiar instructed by *R. Ramachandra Chetty* for petitioners.

Ponnuswami Aiyar and *Narayanaswami Aiyar* for 2nd respondent.

G. T. Ramanujachariar for respondents 4 to 9.

R. Krishna Aiyar for 10th respondent.

1st and 3rd respondents not appearing in person or by pleader.

The Court made the following

ORDER.—This is an application to withdraw I.P. No. 100 of 1927 from the file of the Subordinate Judge of Madura and transfer it for trial and disposal to the Original Side of the High Court. The preliminary objection is raised that such an application will not lie. The provision of law under which the application is made is section 24 of the Civil Procedure Code, and I propose first to consider its maintainability under that section, referring subsequently to some clauses of the Letters Patent which have alternatively been relied upon.

---

*C.M.P. No. 1214 of 1928. 30th July, 1928.

Messrs. Goculdoss Jumnadoss & Co. v. Sadasivier.

Under section 5 (2) of the Provincial Insolvency Act, the High Court has the same power in regard to proceedings under the Act as it has in regard to civil suits; and under section 24 (1) (*b*), Civil Procedure Code, it may at any stage withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and (i) try or dispose of the same; or (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same.

It will be convenient to follow the course taken by the argument and consider in the first place whether the transfer may be ordered under part (ii) above. This requires that the Original Side of the High Court sitting in the Insolvency should be a Court subordinate to the High Court in its appellate jurisdiction and competent to try the cause. As pointed out by Tyabji, J., in *Hindustan Assurance and Mutual Benefit Society, Ltd.* v. *Rail Mulraj*,[1] section 3 of the Civil Procedure Code which defines which Courts are subordinate to the High Court, does not include the High Court, in the exercise of its Original Civil Jurisdiction; nor with reference to the definition of 'district' in section 2 (4) can it be said that the Original Side of the High Court is "District Court" and for that reason subordinate to the High Court under section 3.

There are also difficulties in the way of holding that the Original Side of the High Court would be competent to try and dispose of the Insolvency Petition if it were transferred to it. It is evident that, in order to do so, the High Court would have to exercise the powers which, but for the transfer, would have been exercisable by a District Court, that is to say, the Insolvency Law which it would have to apply would be the Provincial Insolvency Act. But under section 3 of that Act, the only Courts having jurisdiction are District Courts and such Courts subordinate to a District Court as the Local Government may invest with powers. My attention has been drawn to the case in *W. A. Srinivasa Aiyangar* v. *The Official Assignee of Madras*,[2] in which the question arose whether a transfer in the reverse direction from the High Court to the District Court of Tanjore could be ordered, and it was held that it could not for the reason that the two jurisdictions were distinct. This case while deciding that a District Court cannot administer the Presidency Towns Insolvency Act does not, of course, settle the question whether

1. (1914) 27 M.L.J. 645.
2. (1913) 25 M.L.J. 299.

Messrs. Goculdoss Jumnadoss & Co. v. Sadasivier.

the High Court in the exercise of its Original Insolvency Jurisdiction can apply the Provincial Insolvency Act, but I think it is clear that so far as the Civil Procedure Code and the two Insolvency Acts are concerned no such power exists. Accordingly whether it is proposed that the transfer should be made under part (ii) of section 24 (1) (*b*) or under part (i), which enables the High Court to withdraw any proceeding and try or dispose of the same, it appears to me that the same objection exists that competence is lacking: because a necessary condition of the application of part (i) must surely be that the proceeding must be of such a nature that the High Court has jurisdiction to try or dispose of it. I do not think that the provision itself is intended to confer a jurisdiction which would not otherwise exist.

Nor, I think, is this objection removed by any provision to be found in the Letters Patent; clause (13) enables the High Court to remove, and to try and determine, as a Court of extraordinary original jurisdiction, any suit within the jurisdiction of any Court subject to its superintendence; and this clause read with section 5 (2) of the Provincial Insolvency Act no doubt would apply to insolvency proceedings. We have, however, to look at clause 18 to see whether upon such transfer being made a Judge sitting in Insolvency could try the case. Such a Judge is to "have and exercise, within the Presidency of Madras, such powers and authorities with respect to original and appellate jurisdiction and otherwise as are constituted by the laws relating to insolvent-debtors in India." Those laws, namely, the Presidency Towns and Provincial Insolvency Act, do not confer upon a Judge sitting in Insolvency the power which he would need to exercise, if this transfer were ordered, to deal with the case under the latter Act.

My conclusion accordingly is that the application is not maintainable and I dismiss it with costs.

A.S.V. *Application dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE WALLER AND MR. JUSTICE ANANTHAKRISHNA AIYAR.

The Public Prosecutor .. *Appellant**

v.

Ponnuswami Nayak and others .. *Accused.*

F. B.

The Public Prosecutor *v.* Ponnuswami Nayak.

Criminal Procedure Code (V of 1898), Ss. 423 and 439—Discharge of accused—Jurisdiction of High Court to set aside discharge and order commitment for trial.

The High Court has jurisdiction under section 439 of the Criminal Procedure Code to set aside the order of discharge of the accused by the Committing Magistrate and direct that they be committed for trial.

Appeal under section 417 of the Code of Criminal Procedure, 1898, against the acquittal of the aforesaid accused by the Sessions Judge of Madura Division in Sessions Case No. 11 of 1927 and Case taken up in revision by the High Court calling upon accused Nos. 3, 7 and 8 in P.R.C. No. 10 of 1926, on the file of the Court of the Sub-Magistrate of Nilakottai, to show cause why the order of discharge passed in their favour in the above case should not be set aside and why they should not be committed to take their trial before the Sessions Court.

Nugent Grant, K. P. Gopala Menon and *K. Kuttikrishna Menon* for accused.

The Public Prosecutor on behalf of the Crown.

The Court delivered the following

JUDGMENT.—Eight persons were charged with the murder of one Venkatarama Reddi. The Committing Magistrate discharged three of them and committed the rest for trial. At the trial one of the assessors thought that all the five accused were guilty. Two thought that one of them, the fifth, was innocent and the fourth that two—the third and the fifth were. The Sessions Judge, however, acquitted all of them. Against this acquittal the Public Prosecutor has appealed and we have called upon the three accused who were discharged by the Committing Magistrate to show cause why they should not be committed for trial. As we are ordering a re-trial, we propose to say as little

*Cr. Appeal No. 449 of 1927 and Cr.R.C. No. 884 of 1927. (Taken Up No. 25 of 1927.) — 14th December, 1927.

F. B.
The Public Prosecutor v. Ponnuswami Nayak.

as possible about the evidence in the case. A great deal of it relates to the parts said to have been played by two of the discharged accused. It is alleged that while the acquitted accused were parleying with the murdered man these two drove slowly past in a motor car and instigated them to shoot. The Committing Magistrate, on the strength of certain *alibi* evidence, which the Sessions Judge considered to be patently false, came to the conclusion that this part of the story could not be true. The man who is said to have addressed the deceased just before he was shot is the son of one of these persons. If the *alibi* evidence were true, he was as much entitled as his father to be discharged and yet he was committed for trial.

It is obvious that, if this part of the story is an invention, the rest of it is entitled to no credit. The Committing Magistrate came to the conclusion that it was an invention on evidence that the Sessions Judge rejected as false. At the trial, this particular issue, the two accused who were specially affected by it having been discharged, attracted less attention than it deserved. It was, however, a most material issue and we are of opinion that it could not be properly tried in the absence of the persons whom it most concerned. *Ex hypothesi* they were the instigators of the murder and they should certainly have been committed for trial along with their supposed instruments.

In Cr. Appeal No. 449 we set aside the acquittal of the respondents and direct that they be re-tried on the same charges. As regards the discharged men, Mr. Nugent Grant has expressed a doubt as to our jurisdiction to set aside the discharge and direct their committal for trial. A similar objection was taken before Straight, J., in *Empress* v. *Ram Lal Singh*[1] and he negatived it holding that he had power to set aside an order of discharge and direct a committal. With respect, we think that his decision was right. Section 439 of the Criminal Procedure Code confers on us the powers granted to a Court of Appeal by section 423 and one of the powers so granted is that of directing an accused to be committed for trial. The same view was expressed by Wilson, J., in *Hari Dass Sanyal* v. *Saritulla*[2]:

"The High Court under section 423 embodied in section 439 can set aside the order of discharge and direct a charge to be framed and tried by the proper Court. It can, under section 437 and probably also under section 439, order a further enquiry instead of a committal."

1. (1883) I.L.R. 6 A. 40. 2. (1888) I.L.R. 15 C. 608 at 619 (F.B.).

F. B.

The Public Prosecutor v. Ponnuswami Nayak.

This decision was followed in *Emperor* v. *Varjivandas*[3] where it was held that the High Court had jurisdiction under sections 423 and 439, Criminal Procedure Code, to set aside an order of discharge and to direct that a person improperly discharged be committed for trial. We set aside the order discharging the three respondents and direct that they be committed for trial on the same charges as the other five accused.

N.S. *Order of discharge set aside and accused committed for re-trial.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

Subramania Aiyar .. *Petitioner* (Accused).*

Subramania Aiyar, *In re.*

Criminal Procedure Code (V of 1898), S. 428—Statement by defence witness—Power of Appellate Court to examine him as a Court witness in order to ascertain the value of his statement—Section if applicable only to the reception of merely formal evidence.

There is nothing in the terms of S. 428 of the Criminal Procedure Code to preclude an Appellate Court from endeavouring to ascertain the value of the statement made by a defence witness by further examining him as a Court witness, or to limit the application of the section to the reception of merely formal evidence.

Varadarajulu Naidu v. *King-Emperor,* (1919) I.L.R. 42 Mad 885: 37 M.L.J. 81 (S.B.) referred to.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Ramnad in Criminal Appeal No. 36 of 1927 preferred against the judgment of the Court of the 2nd Class Magistrate of Aruppukottai in C.C. No. 572 of 1926.

K. S. Jayarama Aiyar and *T. S. Srinivasa Aiyar* for petitioner.

K. N. Ganapathi for *The Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—The petitioner was convicted of an offence under section 323, Indian Penal Code, by the Sub-Magistrate of Aruppukottai and sentenced to pay a fine of Rs. 10. The conviction and sentence have been upheld on appeal by the Sub-divisional Magistrate, Ramnad. I propose to consider first

---

*Cr.R.C. No. 1056 of 1927. 24th July, 1928.

3. (1902) I.L.R. 27 B. 84.

whether there are grounds for revising the trial judgment, and then whether the appellate judgment is open to exception in revision.

The trial judgment is attacked upon two grounds: (*a*) the learned Sub-Magistrate gave an unsustainable reason for disbelieving D.Ws. 1 and 7, and (*b*) evidence of a conversation between the accused and the Sub-Magistrate alleged to have occurred on 9th November, 1926, was excluded. I can see little substance in point (*a*). The Sub-Magistrate states that D.W. 7, the proprietor of the motor car which injured the complainant's son, was interested in the motor accident case and so naturally denied having paid any money. That is a fair comment upon the evidence. It may be going rather far to say that his admission would make him criminally liable, though indeed such a belief would not be unreasonable in the witness, and it would be quite natural to wish to suppress an attempt at composition, as an acknowledgment of at least civil liability. As regards point (*b*), the defence case is that the accused, who is a Village Munsif, was on the 9th November questioned by the Sub-Magistrate, in the presence of the Circle Inspector, about his omission to report the accident. On the ground that the Sub-Magistrate's evidence was needed upon this point, an application for transfer was presented to the District Magistrate. The learned District Magistrate seems to have misapprehended the purpose of this application, which was clearly enough stated in paragraph 5 of the petition, and rejected the application on the ground that there was no sufficient reason to fear bias on the part of the Sub-Magistrate. In view of the action I propose to take, I do not wish to say anything which might be used by the one side or the other, as to the effect upon the case of assault, of either this alleged conversation or of a connected matter—genuineness of Ex. I. It was open to the petitioner, as soon as the District Magistrate's adverse order was passed, to come up to this Court with an application for transfer; and his omission to do so, in my view, disentitles him now to ask for revision upon this ground. Nor have I any material in the shape of affidavit or otherwise upon which to conclude that any evidence which the Circle Inspector who was a defence witness might give upon this topic was excluded. I do not think, therefore, that there are grounds for reversing the trial judgment.

Coming now to the appellate judgment, the main point taken is that the learned Sub-divisional Magistrate deemed it neces-

Subramania Aiyar, *In re.*

sary to take additional evidence under section 428 of the Code of Criminal Procedure, further examining as a Court witness, the Circle Inspector who has already deposed as a defence witness, and that that course was in the circumstances unjustified. The learned Sub-divisional Magistrate gives his reasons in his judgment for taking this additional evidence—the Sub-Magistrate had failed to ascertain what information the accused had given against P.W. 2's son, who is a constable and when his report against P.Ws. 2 and 4 was made. It is urged that these are not such points as an Appellate Court is entitled to elucidate by the reception of further evidence. The suggestion is made, but I think it is groundless, that there was an expectation that the additional evidence would prove unfavourable to the accused. On the other hand, so far as appears, there was nothing to show that it would not afford a demonstration of the alleged grounds of hostility between P.Ws. 2 and 4 on the one side and the accused on the other. There is certainly nothing in the terms of section 428, Criminal Procedure Code, to preclude an Appellate Court from endeavouring by this means to ascertain the value of statement made by a defence witness, or to limit the application of the section to the reception of merely formal evidence, which in the peculiar circumstances dealt with in *Varadarajulu Naidu* v. *King-Emperor*,[1] was all that the learned Judges who decided that case felt justified in approving. Nor, having regard to the difference in language, are the decisions passed under the corresponding provision in the Civil Procedure Code (Order 41, Rule 27) any trustworthy guide. I cannot, therefore, accept the objection that, in principle, the Appellate Court exceeded the discretion vested in it by taking this additional evidence.

There is, however, one respect in which the learned Sub-divisional Magistrate has failed to take note of the evidence, and a consideration of which might have led him to a different view of the attitude of P.W. 2. This is nothing less than an admission by P.W. 2 himself that his son was transferred at the accused's instance. I cannot say that the failure to take this admission into account may not have led the Appellate Court to place a false value upon this witness's evidence, to say nothing of the evidence of the Circle Inspector, and so have vitiated the finding. I feel compelled upon this ground to set aside the judgment in appeal as not being based upon all the material evi-

1. (1919) I.L.R. 42 M. 885: 37 M.L.J. 81 (S.B.).

Subramania Aiyar, *In re.*

dence in the case. For the reasons that I have given, I do not go further and direct the exclusion of the additional evidence taken. The appeal will be re-heard and disposed of by a Magistrate other than the Sub-divisional Magistrate whose judgment has been set aside, should that officer be in charge of the same Court when the appeal comes on for hearing.

N.S. *Petition allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

ORDINARY ORIGINAL CIVIL JURISDICTION.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI.

T. Unikanta Menon and another .. *Plaintiffs* *

v.

The Board of Commissioners for the Hindu Religious Endowments, Madras .. *Defendants.*

Unikanta Menon *v* Board of Commissioners for the Hindu Religious Endowments, Madras.

Madras Hindu Religious Endowments Act (II of 1927), S. 84—Question whether temple private or public—Jurisdiction of Endowment Board to determine—Suit questioning the competency of the Board to act on the ground that temple is private—Allegation by the Board in the written statement that temple is public—Board if precluded from deciding the question subsequently.

Under S. 84 of the Madras Hindu Religious Endowments Act it is the Endowment Board that has to decide in case of dispute whether a temple is public or private, and merely because the Board has, in its written statement in a suit filed to question its competency to act because the temple is a private temple, denied the allegation in the plaint that the temple is a private temple and stated that it is a public temple, it cannot be said that it has precluded itself from exercising the functions of a Tribunal and deciding the question.

L. A. Govindaraghava Aiyar, P. S. Narayanasami Aiyar and *P. S. Ramachandra Aiyar* for plaintiffs.

P. Venkataramana Rao for defendants.

The Court delivered the following

JUDGMENT.—These are two out of a number of suits filed against the Madras Hindu Religious Endowments Board for a declaration that Madras Act I of 1925 (The Madras Hindu Religious Endowments Act) was not legally passed by the Legislature and is invalid and inoperative, and that the Board had no authority or power to act under the provisions of that Act and for an injunction restraining the Board from exercising all or any of the powers conferred on it by the Act.

---

*C.S. Nos. 229 and 376 of 1926. 10th August, 1928.

Unikanta Menon v. Board of Commissioners for the Hindu Religious Endowments, Madras.

After the institution of these suits, Madras Act II of 1927 was passed and by section 7 the Board constituted by and the acts done by it under the Act of 1925 were validated.

In *Sri Vythilinga Pandara Sannadhi* v. *Sir T. Sadasiva Aiyar*[1] and the other connected suits I held that section 7 of Madras Act I of 1925 is valid and within the competence of Legislature and that under section 84 of the Act in case of dispute as to whether an endowment is public or private it is the Board that should in the first instance give a decision which will be final subject to the right given by the Act itself to the other side to have the order set aside by a competent Court.

I have given my reasons in those suits for arriving at that decision.

These two suits were not ready when those cases came on and they are posted to-day for settlement of issues.

Mr. Govindaraghava Aiyar who appears for the plaintiff in C.S. No. 376 stated that in view of my decision in *Sri Vythilinga Pandara Sannadhi* v. *Sir T. Sadasiva Aiyar*[1] he did not without prejudice to his right of appeal propose to argue the questions decided in those suits over again, but that in the present suit there was one additional circumstance, namely, that even assuming that section 7 is *intra vires* and under section 84 it is the Board that has to decide in case of dispute whether a temple is public or private, still in this case as the Board has in its written statement denied the allegation in the plaint that the temple is a private temple and stated that it is a public temple, it has precluded itself from exercising the functions of a tribunal and deciding the question and therefore an injunction ought to be granted restraining the Board from exercising its powers.

In C.S. No. 229 also the Advocate for the plaintiff adopts the same arguments.

I do not think this contention is sound. These two suits were filed to question the validity of the Act under which the Board purported to act and also to question the competency of the Board to act because the temple is a private temple.

Section 2 of the Act applies to all public religious endowments save as expressly provided by the Act. The exception

1. (1928) 55 M.L.J. 605.

with which we are concerned is that the Act does not apply to private temples.

Unikanta Menon v. Board of Commissioners for the Hindu Religious Endowments, Madras.

Section 84 states that when any dispute arises as to whether a temple is a public temple or a private temple, the Board shall decide the question, that the person affected by the decision may apply within a year from the date of the Board's order to the Court to set it aside, and that, subject to the result of such publication, the order of the Board shall be final. Section 84 therefore pre-supposes that the Endowments Board on the one side should affirm that the temple is a public temple and the Dharmakartha on the other that it is a private temple. It is only then that a dispute will arise under section 84 and for some reason or other which the Legislature thought sufficient, it enacted section 84 which says that the question as to the public or private nature of a temple shall be decided by the Board, and it gives the party affected by the decision to apply to a Civil Court and get the order of the Board set aside. If the Board had before any suit was filed against it said that in its opinion the plaint temple is a public temple and called on the plaintiff to contribute and the plaintiff denied it, it cannot be disputed that the Board which had asserted that it is a public temple would be the tribunal to decide the question. I think it makes no difference if that statement should be made by the Board in its written statement in a suit filed against it questioning its jurisdiction. The plaintiff in his plaint said that the temple is a private temple. The Board which had certain information before it when it proceeded to call upon the plaintiff to render an account in regard to the temple says in its written statement that it has jurisdiction over the temple and that it is a public temple. I find it difficult to see how it can be said that the Board has made up its mind already and is therefore disqualified from deciding the question under section 84. The Legislature has given preliminary jurisdiction to the Board which can only be exercised when the Board is of opinion that the temple is a public temple. I am, therefore, unable to see how having regard to the express provisions of the Act (sections 2 and 84) there can be any question as to the Board being incompetent to act because it is of opinion that the temple is a public temple and has called on the plaintiff to act on that footing. As I said before, if before any suit was filed, the Board had made a statement that it is a public temple, section 84 would apply and it is difficult to see how it would make any difference if in a suit against the

Unikanta Menon v. Board of Commissioners for the Hindu Religious Endowments, Madras.

Board in order to meet the allegations in the plaint it repeats the same statement.

Reference has been made to *Frome United Breweries Co.* v. *Bath Justices*[2] and *Rex* v. *Essex Justices. Perkins Ex parte*[3] as authority for holding that where a body having judicial or quasi-judicial powers has decided against a party, that body would not be qualified to act in its judicial or quasi-judicial capacity in deciding any questions affecting the opposite party. That may have been a very good ground for opposing the passing of S. 84 in the Legislative Council. But I do not think in the face of section 84 I can hold the mere fact that the Board has in the exercise of its preliminary jurisdiction given to it by section 84 asserted that the temple is a public temple, would take away its right to act under section 84. Otherwise section 84 would be a dead letter as in every case the Board has to call on the trustee of the temple to submit to its jurisdiction on the footing that the temple is a public temple and it can be said that it has made up its mind.

There is another answer to the plaintiff's contention which is this. The Board consists of five members. Under the notification and rules it is not necessary that all the five members should act in a particular matter. Any two of them could act and come to a decision in any matter which no doubt goes in the name of the Board. It is not suggested in this case that all the five members of the Board met together and decided upon any evidence that the temple is a public temple. As I said, the rule is that only two members act in any particular matter. They constitute as it were a Bench and give their decision. The written statement in the present case is only verified by one of the members of the Board, Mr. Chengayya. In *Frome United Breweries Co.* v. *Bath Justices*[2] it was held that the fact that one member of a Board acted in a particular matter would not disqualify the other members of the Board who did not take part in the matter from acting in the same matter. I do not think that even if there was an enquiry there is anything in the Act to prevent other members of the Board, who did not take part in the enquiry, from deciding the questions under S. 84.

The next question is what power the Original Side of this Court has got to interfere in this matter. No doubt the Board has its office in Madras but the temple is situate in

2. (1926) A.C. 586. 3. (1927) 2 K.B. 475.

Malabar and the Court which would have any jurisdiction to act under section 84 would be the District Court of South Malabar. It is admitted that no enquiry has been held under section 84 and the matter is pending as an injunction was issued against the Board proceeding with the enquiry. If the Board under S. 84 should proceed with the enquiry it is open to the plaintiff to object to all or any particular members of the Board holding the enquiry and if in spite of the objection the Board should decide the question, remedy is given to the plaintiff to appeal to the District Court under section 84, clause (2) and it may be a good ground of appeal that the Board is not competent to act having made up its mind before. The remedy being open to the plaintiff I do not think the High Court on the Original Side could interfere in the matter and grant an injunction restraining the Board from acting under the powers given by the Act. If the Board is prohibited from holding an enquiry I find it difficult to see who else can be deputed to do it. The High Court cannot transfer the enquiry to anybody else as no other body has jurisdiction under the Act.

Unikanta Menon v. Board of Commissioners for the Hindu Religious Endowments, Madras.

I am, therefore, of opinion that even if the plaintiff's objections are well founded (which I do not think, they are) this is not a case where an injunction should be granted.

There is no other question of fact or law raised before me in these two suits.

For the reasons already given by me in *Sri Vythilinga Pandara Sannadhi* v. *Sir T. Sadasiva Aiyar*[1] and for the reasons given in dealing with the additional point raised in these two suits, I am of opinion that the plaintiff's suits must fail. I dismiss both the suits with costs.

N.S. *Suits dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

ORDINARY ORIGINAL CIVIL JURISDICTION.

PRESENT:—MR. JUSTICE VENKATASUBBA RAO.

Mrs. M. E. D'Cruz .. *Plaintiff**

v.

Nagiah Naidu and others .. *Defendants.*

Hindu Law—Will—Construction—Son—Life-estate to, and absolute estate to his male children after his death—Bequest of—Period of taking—Words indicating—Court's power to supply, when not mentioned in will—Condition—Words "Aan Santhathi"—Meaning.

Mrs. M. E. D'Cruz v. Nagiah Naidu.

---

*C.S No. 251 of 1927. 2nd March, 1928.

1. (1928) 55 M.L.J. 605.

Mrs. M. E. D'Cruz v. Nagiah Naidu.

The will of a Hindu provided that his property should be taken by his wife *V*, and her minor son, *N*, that *V* should be in management of the property till *N* should attain majority, and that, on the happening of that event, *N* should manage the property and pay suitable maintenance to his mother, but that neither *N* nor *V* should have any power to encumber, sell or mortgage the property. The will proceeded: "The aforesaid properties shall be taken by the male issue of my son *N* and shall be used and enjoyed by them with power to sell, make gift, etc."

Held, on a construction of the will, (1) that *V's* right, after *N* attained majority, was only a right to maintenance; (2) that *N* took only a life-estate in the property bequeathed to him by the will; and (3) that, after his death, his male children took the same absolutely.

Though there were no words in the will to the effect that *N's* sons were to take the property *after his death*, the scheme of the will required that those words must be supplied.

The expression "*Aan Santhathi*" means male issue and not male descendants.

The terms of the will were as follows:—

On the 27th January, 1906, the Will and Testament is written and left by me Ambathi Narasiah Naidu, son of Ambathi Dasari Naidu, deceased, Yadhava by caste, merchant by occupation and Vaishnavite by religion and residing in House No. 62, Brick Kiln Road, Purasawalkam, Madras, with my free will and while in the enjoyment of sound understanding and clear memory.

1. Owing to my not being in good health and owing to illness at present the undermentioned moveable and immoveable properties which I acquired as my self-acquisition with my labour should be enjoyed as per the arrangement herein undermentioned.

2. Out of the aforesaid my properties the bungalow and ground Nos. 3, 4 in Cook's Road, Perambore, Madras, particularised in the first item in the undermentioned list should after me be taken by Muni Ammal, daughter of my first wife, and she should receive till her life-time the rents, etc., derivable from that property and herself pay taxes and carry out repairs, etc., and enjoy the same. If the aforesaid Muni Ammal has son, daughter or any issue, the aforesaid children should after her use and enjoy the aforesaid bungalow with power to give away in gift, exchange or sell. If perhaps the aforesaid Muni Ammal should have both male and female issues the male issue should himself of his own accord enjoy the aforesaid property. If there be no male issue the female issue alone should take it. In case the aforesaid Muni Ammal has no such issue whatever, neither she nor her husband Narayanaswami Naidu has any right whatever to sell, mortgage or give away in gift the aforesaid property after the aforesaid Muni Ammal, my son Nagiah Naidu should take the aforesaid property.

3. Deducting the property given away to the aforesaid my daughter Muni Ammal from out of the properties mentioned in the

Mrs. M. E. D'Cruz v. Nagiah Naidu.

list hereunder the remaining moveable and immoveable properties should be taken by my second wife Vengadammal and my son aged 15, minor Nagiah Naidu and the aforesaid my wife Vengadammal should be administering the aforesaid properties till the aforesaid minor attains age. When the aforesaid my son attains age and becomes able to look after his family affairs, he should manage the aforesaid immoveable properties and be maintaining his mother Vengadammal to her satisfaction and without causing any pain of mind.

4. Neither the aforesaid my son Nagiah Naidu nor my wife Vengadammal has any power to encumber, sell or mortgage the aforesaid my properties. The aforesaid properties should be taken by the male issues of the aforesaid my son Nagiah Naidu and be used and enjoyed with power to give away in gift, sell, etc.

5. As I have appointed my elder sister's son Davaralu Ponniah Naidu, son of Davaralu Poliah Naidu as executor to conduct and to get conducted the arrangements mentioned in this will the aforesaid Ponniah Naidu should have (with him) the aforesaid my son Nagiah Naidu and not only conduct (matters) according to the above arrangement but also conduct the business in sheep which I am carrying on and he should recover the amounts recoverable and pay the amounts due in that business and be carrying on.

6. Besides this, if perhaps in the matter of the business of sheep which I am carrying on with Ramachandra Naidu, son of Veeral Pothi Naidu, the aforesaid Ramachandra Naidu desires to separate himself from the partnership, accounts of the half share which should go to me should be looked into and whether there is anything to be paid or recovered, the same should be closed and settlement made.

7. In this manner, the aforesaid Ponniah Naidu should conduct according to the arrangement mentioned in this will after my lifetime.

8. The undermentioned jewels which I put on on my daughter the aforesaid Muni Ammal should be enjoyed by the aforesaid Muni Ammal till her lifetime and should after her if there be no issue be taken by my son Nagiah Naidu.

9. The lands which I purchased and kept in the name of the aforesaid my daughter should be enjoyed till her lifetime by the aforesaid my daughter Muni Ammal and should after her lifetime, if she has no issue, be taken by my son Nagiah Naidu.

J. A. Pinto for plaintiff.

O. T. Govindan Nambiar with *S. G. Satagopa Mudaliar* for defendants.

Mrs. M. E. D'Cruz v. Nagiah Naidu.

The Court delivered the following

JUDGMENT.—This case raises a somewhat knotty point of construction of a will and has been argued fully and with care by Messrs. Pinto and Nambiar. The suit has been brought on a mortgage executed by one Nagiah Naidu, who is the 1st defendant. His minor sons have been joined as defendants 2 to 4. What was the interest, if any, which Nagiah possessed in the property, which could have been validly mortgaged to the plaintiff? This is the question I have to decide.

The property originally belonged to Narasiah, the father of Nagiah, and he executed the will in question in 1906. Paragraphs 3 and 4 deal with the property in question. The testator says first, that the property shall be taken by his wife Venkadammal and her minor son Nagiah. He then proceeds to say that his wife shall be in management of the property till Nagiah attains majority; on the happening of this event, Nagiah shall manage the property and pay suitable maintenance to his mother. Pausing here for a moment, I find that the meaning is fairly clear. The Tamil equivalent of the word 'taken' in the original will is அடைந்து which connotes that the property shall be taken and enjoyed by the persons mentioned. The testator has also used in his will certain Tamil words which mean 'administer or manage,' and I cannot, therefore, agree with the contention that when the testator uses the word 'taken', he does not intend to convey a different meaning. A careful perusal of the instrument will show that the testator has used the word "அடைந்து" (taken) as a dispositive word, as distinct from expressions which convey merely that it is a right of management that is intended. What do the clauses, then, that I have referred to, mean? In the first instance, the testator says that the property shall be taken by his wife and by his son; but the moment the son attains majority, the interest of the wife is immediately cut down to a mere right to maintenance. The two clauses must be read together and I am satisfied that their effect is not that the wife takes an absolute interest but that her right, after Nagiah attains majority, is only to maintenance. (I may mention that Venkadammal is said to be alive, but has not been made a party to the suit). If there were no further clauses, I think the case would present little difficulty.

I have now done with paragraph 3 and the testator in the next paragraph goes on to say that neither Nagiah nor Venka-

Mrs. M. E. D'Cruz v. Nagiah Naidu.

damma shall have any power to encumber, sell or mortgage the property. Then follows the clause which reads thus:—

"The aforesaid properties shall be taken by the male issue of my son Nagiah and shall be used and enjoyed by them with power to sell, make gift, etc."

Do these two clauses cut down what was apparently a heritable estate conferred on Nagiah into a bare life-estate? There are several dispositions in the will in favour of Nagiah as well as others without such a limitation. I may particularly refer to paragraphs 8 and 9. It is noticeable that the testator makes a distinct provision in favour of his grandsons and adds that they shall enjoy the property with full powers of alienation. Would I be justified in ignoring these words, or while reading the will, scoring out this clause? It seems to me that the effect of this clause is to confer upon Nagiah only a life-estate and the testator intends that after Nagiah's death the property shall be absolutely taken by his male children. If the combined effect of the clauses in paragraph 3 and the last clause to which I have referred is, that Nagiah shall take only a life-estate, the restraint imposed on alienation is not inconsistent with the bequest. What is prohibited is alienation of the property and is not alienation of the life-estate. The clause in regard to alienation is thus consistent with the view that what is conferred on Nagiah is only a life-estate. It is undoubtedly true that if I once hold that, on a true construction, Nagiah takes an absolute interest, the covenant in restraint of alienation would be void; such a condition deprives the property of its legal incidents and would be repugnant to the main purpose of the transfer. This is enacted by section 10 of the Transfer of Property Act and the principle underlying it has been applied in the case of Hindus. *Ashutosh Dutt* v. *Doorga Churn Chatterjee*,[1] *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*,[2] *Lala Ramjewan Lal* v. *Dal Koer*[3] and *Muthukumara Chetty* v. *Anthony Udayar*.[4]

One reason suggested against my accepting the view that Nagiah takes only a life-estate is that there are no words to the effect that the grandsons shall take the property *after his death*; but, it seems to me that the general scheme of this will

1. (1879) L.R. 6 I.A. 182: I.L.R. 5 C. 438 (P.C.).
2. (1897) L.R. 24 I.A. 76: I.L.R. 24 C. 834 at 849 (P.C.).
3. (1897) I.L.R. 24 C. 406 at 411.
4. (1914) I.L.R. 38 M. 867 : 29 M.L.J. 617.

Mrs. M. E. D'Cruz v. Nagiah Naidu.

makes it essential that these words must be supplied. Section 77 of the Indian Succession Act runs thus:

"Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context."

The rule is thus stated in Jarman on Wills, 6th Ed., Vol. I, p. 581:

"Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context."

"Of this we have a very simple example in an early case, where a devise to *A.* and the heirs of his body, and, if he should die, then over, was read 'and if he should die without issue'."

The leading case on the point is *Abbott* v. *Middleton*[5] and Romilly, M. R., held that the words "without leaving any child" could be supplied after the words "dying" in the final gift over.

The bequest ran thus:

"To my son, during his life, and, on his demise, to his child or children, but in case of my son dying before his mother, to the children of my daughters."

The words "without leaving any child" were supplied after the words "dying before his mother". The case was taken to the House of Lords, the Court was divided in opinion, but the view of the Master of the Rolls was upheld. Lord Wensleydale, who was not for supplying the omission, states the rule tersely thus:

"Words and limitations may be supplied or rejected when warranted by the immediate context or general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention however reasonable, in opposition to the plain and obvious sense of the instrument."

Reading the entire will and all its parts, I have come to the conclusion that the testator intended that Nagiah was to take a life-estate and after his death the property was to be taken by the latter's sons. At the time the will was made Nagiah had no sons and it is common ground that it is by reason of Act VIII of 1921 that the bequest in favour of Nagiah's unborn sons is valid and takes effect. No question has been raised in regard to the applicability of this Act. In the result, I must hold that it was only the life-interest of Nagiah that could be validly mortgaged to the plaintiff.

5. (1858) 7 H.L.Ca. 68.

Mr.
M.E. D'Cruz
v.
Nagiah
Naidu.

Mr. Pinto for the plaintiff advances an ingenious argument and it is this. He says that what is taken by Nagiah is an absolute estate and the only effect of the clause relating to the testator's grandsons is to retain for the bequest in favour of Nagiah the quality of ancestral property. (See *Nagalingam Pillai* v. *Ramachandra Tevar*[6] and *Rajagopal Pillai* v. *Veeraperumal Pillai*.[7]) The provision that the son shall have no power to alienate but that the grandsons shall take a heritable estate, militates against this contention. The clauses to which I have referred make it clear that the estates taken by Nagiah and his sons are not co-existing but consecutive.

There is another argument of Mr. Pinto which I may notice. The Tamil words in paragraph 4 of the will, which have been rendered as "male issue" are ஆண் சந்ததி (*Aan Santhathi*). Mr. Pinto says these words mean not male issue but male descendants. His argument is, that if these words mean male descendants, the clause would be void and Nagiah would take the property as on intestacy. It is unnecessary to decide this point, for it is clear beyond doubt that the expression means male issue. The word 'santhathi' is used in two places in paragraph 2 in the sense of '*issue*' and this is not disputed. I find no reason for assuming that the same word has been used in two different senses. (*See* section 86, Indian Succession Act).

The case is adjourned to to-morrow for the plaintiff to prove his claim.

I pass a mortgage decree against the 1st defendant for Rs. 3,720 with interest on Rs. 3,000 at 12 per cent. per annum from this day to the date fixed for sale and at 6 per cent. on the aggregate amount thereafter and costs of the suit The decree is against the interest which, I have held, the 1st defendant has in the property in question.

Time for redemption is 15 days.

The plaintiff shall pay the costs of defendants 2 to 4 which I fix, by consent, at Rs. 100.

Mr. Satagopam for the minor defendants 2 to 4 asks me to allow their mother, their guardian *ad litem*, to take the actual costs incurred from the minors' estate. I give her this

6. (1901) I.L.R. 24 M. 429: 11 M.L.J. 210.
7. (1927) 53 M.L.J. 232.

Mrs. M. E. D'Cruz v. Nagiah Naidu.

permission and for this purpose Mr. Satagopam may get his costs taxed as between attorney and client.

A.S.V. *Suit decreed against 1st deft.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE RAMESAM.

Jumna Bai .. *Petitioner** (*4th Plff.*)

v.

S. Rm. M. Rm. Ramanathan Chettiar represented by guardian *ad litem* Muthayee Achi *alias* Chittal Achi and another .. *Respondents* (*16th and 17th Defts.*).

Jumna Bai v. Ramanathan Chettiar.

High Court—Powers of, when the moffusil Courts are closed for the vacation—Jurisdiction to receive a plaint which ought to be filed in a moffusil Court and pass interlocutory orders—Jurisdiction to pass interlocutory orders in suit pending in moffusil Court—Letters Patent, clause 13—Form and contents of petition—Power of High Court to grant bail—Criminal Procedure Code, S. 498.

There is no provision of law by which the High Court can in the first instance receive a plaint which ought to be filed in some inferior Court in the moffusil and pass interlocutory orders pending the disposal of the suit on the ground that the moffusil Court is closed for the vacation.

C. M. P. No. 1498 of 1919 followed.

In the case of a suit pending on the file of a moffusil Court which is closed for the vacation, the High Court can get seisin over the whole case by transferring the case to itself under clause 13 of the Letters Patent and then pass an interlocutory order. But the petition in the High Court must on the face of it apply for the transfer of the suit in the moffusil Court temporarily to the High Court, then ask for the interlocutory order and then apply for retransfer of the whole proceedings to the original court. In respect of Court-fees and other matters it must comply with the provisions of law dealing with all such prayers and even then it is a question whether the urgency is such that the abovementioned form of procedure should be gone through.

Section 498 of the Criminal Procedure Code gives power to the High Court to grant bail in cases pending anywhere in the Presidency.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an injunction restraining the defendants Nos. 16 and 17 from taking possession of the C. Schedule properties in O.S. No. 101 of 1925 on the file of the Court of the Subordinate Judge of

---

*C. M. P. No. 2106 of 1928. 5th June, 1928.

Trichinopoly pending disposal of the above suit (O.S. No. 101 of 1925).

T. R. Venkatarama Sastriar for *K. S. Sankara Aiyar* for petitioner.

T. M. Krishnaswami Aiyar for *M. Subbaroya Aiyar* for 1st respondent.

The Court made the following

ORDER.—This and several petitions of similar nature have come up before me as Vacation Judge. In all these I raised the question of jurisdiction. The matters that have so come up before me and in which I entertain doubts as to jurisdiction may be divided into two groups : (1) Cases in which there is no pending proceeding anywhere in the Presidency. For the first time a plaint which ought to be filed in a moffusil Court—a District Munsif's Court, Subordinate Judge's Court, or District Court, or an appeal or a original petition but which could not be filed there as that Court is closed, is sought to be filed here and an order is sought from the High Court in the nature of an injunction restraining the defendant from doing something. The High Court is expected to transmit the plaint and the other papers to the Court where it ought to have been filed on the expiry of its vacation. (2) Cases in which there is a proceeding pending in some of the Lower Courts either a original suit or an appeal pending in an Appellate Court (not the High Court) and a party wishes to obtain an interlocutory order. In either case, pending the main proceeding the party desiring to obtain an interlocutory order finds that he cannot obtain such an order because the Court is closed and therefore seeks to obtain it in the High Court. I may observe that in both the above cases there is no main proceeding pending in the High Court. The question is whether the High Court has got jurisdiction to pass any orders in those cases.

One of the provisions of law referred to by the learned vakil for the petitioner who argued the matter before me is clause 13 of the Letters Patent. That clause enables the High Court to remove any suit pending in any Court within the Presidency to its own file. This clause does not help the first group of cases. How far it will help the second group will be discussed later on. Clause 17 of the Letters Patent gives to the High Court the jurisdiction which the Supreme Court possesses over the persons and estates of infants, idiots and lunatics within the whole Presidency. This clause does not help the two groups

Jumna Bai v. Ramanathan Chettiar

of cases under discussion. Clause 34 relates to testamentary and intestate jurisdiction within the whole Presidency. That also does not help the two groups of cases now under discussion. Similarly, clause 35 relates to matrimonial jurisdiction in the whole Presidency. The result is I do not find any provision of law by which the High Court can in the first instance receive a plaint which ought to be filed in some inferior Court within the Presidency and pass orders pending the disposal of the suit. It may be that the High Court has concurrent jurisdiction along with the City Civil Court and the Small Causes Courts within the limits of the Ordinary Original Civil Jurisdiction and in respect of suits arising within that area the matter may be different. But, I am now dealing with matters that have arisen outside the Ordinary Original Jurisdiction of the High Court. This is the view taken by Seshagiri Aiyar, J., in C. M. P. No. 1498 of 1919. In that case the petitioner sought to file in the High Court a plaint which ought to have been filed ordinarily in the District Munsif's Court of Dindigul and prayed for a temporary injunction. His Lordship held that neither R. 4 of the Appellate Side Rules nor clause 13 of the Letters Patent nor section 107 of the Government of India Act can help the plaintiff in the matter. He also pointed out, and I agree with his observations, that section 498 of the Criminal Procedure Code gives power to the High Court to grant bail in cases pending anywhere in the Presidency, and the analogy based on that consideration cannot help the petitioner. This disposes of the first group of cases mentioned above. In all those cases my order is that the plaints and petitions shall be returned to be presented to the proper Courts.

I now come to the second group of cases. C. M. P. No. 2106 falls under this group. As a suit had been filed in the Sub-Court of Trichinopoly and because the Sub-Court is closed the application is made for an injunction. In this group it may be that the High Court can get seisin over the whole case pending before a Subordinate Court by transferring the case to itself under clause 13 of the Letters Patent and can then deal with the matter. In so doing the High Court can pass an interlocutory order either granting injunction or some other relief. But it has been held in *Srinivasa Aiyar* v. *Balakrishna Devai*[1] that the application for transfer of a suit in a mofussil Court to the High Court must be made in the Original

1. (1911) 22 M. L. J. 187.

Jumna Bai v. Ramanathan Chettiar.

Side and therefore the procedure taken by the petitioner for obtaining an urgent order in the High Court must conform to this principle, *i.e.*, it must involve as a part of the steps taken on application to transfer the suit itself to the Original Side of the High Court. It may be that at the termination of the proceeding in the High Court the suit is intended to be re-transferred and the process of transfer and re-transfer is not actually intended to be gone through, but even then the step taken must on the face of it necessarily conform to the form of going through these two steps. The petition in the High Court must on the face of it apply for a transfer of a suit in the mofussil Court temporarily to this Court, then ask for an injunction and then apply for re-transfer of the whole proceedings to the Original Court. In respect of. Court-fees and other matters it must comply with the provisions of law dealing with all such prayers and even then it is a question whether the urgency is such that the abovementioned form of procedure should be gone through. In the present case I do not think that the matter is so urgent as to make it necessary for me to go through the above forms. The result is the petition is dismissed with costs.

Memorandum of costs will follow.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE REILLY.

Chellapathi Naidu and others .. *Petitioners (2 to 4 Counter-petitioners)*

v.

T. Subba Naidu ... *Respondent (Petitioner.)*

Chellapathi Naidu v. Subba Naidu.

Criminal Procedure Code (V of 1898), S. 145—Petition to District Magistrate—Transfer by District Magistrate to Sub-divisional Magistrate having no territorial jurisdiction over the land—Preliminary order and final order by the Sub-divisional Magistrate—Validity of—Duty of Magistrate to write a judgment giving reasons.

A petition was presented to a District Magistrate alleging that there was likely to be breach of the peace in connection with certain land and praying for action to be taken under S. 145 of the Criminal Procedure Code. The District Magistrate decided to take the petition on file and then transferred it to a Sub-divisional Magistrate for disposal. But the land concerned was not within the local limits of the jurisdiction of that Sub-divisional

---

*Cr. R. C. No. 344 of 1928. 17th Auguts, 1928.
Cr. R. P. No. 277 of 1928.

Chellapathi Naidu v. Subba Naidu.

Magistrate. The Sub-divisional Magistrate passed a preliminary order under S. 145 (1) of the Criminal Procedure Code and finally passed an order under S 145 (6).

Held, (on revision) that the Sub-divisional Magistrate's preliminary order under clause 1 of S. 145 was without jurisdiction, as the land concerned was not within the local limits of his jurisdiction, and consequently the entire subsequent proceedings were also without jurisdiction.

Konda Reddi v. *King Emperor,* (1917) I.L.R 41 Mad. 246 referred to

Arumuga Tegundan and another, (1902) I L.R 26 Mad. 188 and *Satish Chandra Panday* v. *Rajendra Narain Bagchi,* (1895) I.L.R. 22 C. 898 distinguished.

Obiter.—It is the duty of a Magistrate holding an enquiry under S. 145 of the Criminal Procedure Code to write an order or judgment which shows that he has considered the contentions of the parties and the evidence put before them and which gives the reasons for his decision. There is nothing in the section to absolve the Magistrate from that ordinary duty.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-divisional Magistrate of Trivellore, dated 24th December, 1927, in Mis. Case No. 19 of 1927.

M. S. Venkatarama Aiyar for petitioners.

C. Narasimhachariar for respondent.

K. N. Ganapathi for *Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER.—In this case the Sub-divisional Magistrate of Trivellore in the Chingleput District has made what purports to be an order under S. 145 (6) of the Code of Criminal Procedure. It is objected for the petitioners here that that order was made without jurisdiction. It appears that the Respondent here presented a petition to the District Magistrate of Chingleput alleging that there was likely to be breach of the peace in connection with certain land and praying for action to be taken under S. 145 of the Code.

The District Magistrate, as he says, decided "to take the petition on file" and then transferred it to the Sub-divisional Magistrate of Trivellore for disposal. The Sub-divisional Magistrate of Trivellore proceeded to make what purported to be an order under S. 145 (1). But it happened that the land concerned was not within the local limits of the jurisdiction of that Sub-divisional Magistrate. The petitioners here therefore contend that he had no jurisdiction to initiate proceedings under section 145 (1).

Chellapathi Naidu v. Subba Naidu.

For the respondent it is contended that the District Magistrate had under S. 192 of the Code power to transfer the inquiry at any stage and that the District Magistrate having once transferred this matter to the Sub-divisional Magistrate of Trivellore, that Sub-divisional Magistrate had jurisdiction to proceed with an inquiry under S. 145. *Arumuga Tegundan and another*[1] and *Chandra Panday* v. *Rajendra Narain Bagchi*[2] have been quoted for the respondent to show that inquiries under S. 145 of the Code may be transferred by the proper authorities from one Court to another. But it must be noticed that in each of these cases the order under section 145 (1), which is the initiary step in proceedings under S. 145, had been made by a Magistrate who had local jurisdiction over the land concerned. In view of the decision in *Arumuga Tegundan and another*[1] I must take it that, if the District Magistrate had himself made an order under section 145 (1) in this case as he had undoubtedly jurisdiction to do . . . . and had then transferred the matter to the Sub-divisional Magistrate of Trivellore, the Sub-divisional Magistrate of Trivellore would have had jurisdiction to proceed with the inquiry, though I may perhaps venture to say that, if I had not that decision before me, I should have regarded that question as open to doubt. But I have no doubt that the order under section 145 (1) in such a case must be made by a Magistrate having local jurisdiction over the land or water concerned. That I think is made clear both by the object and wording of the section. The object of section 145 is, not to provide parties with an opportunity of bringing their civil disputes before a Criminal Court or of manœuvring for position for the purpose of subsequent civil litigation, though that is often the effect of such proceedings, but to arm the Magistrate concerned with an additional weapon for maintaining peace within the area for which he is responsible. And the wording of S. 145 (1) requires the Magistrate to state in his initial order that he is satisfied that there is a dispute likely to cause a breach of the peace concerning some land or water or its boundaries within the local limits of his jurisdiction. It is not the business of any Magistrate as such to maintain order or peace outside the limits of his local jurisdiction. What the Trivellore Sub-divisional Magistrate has in effect done in this case is to say "I am satisfied that there is a dispute likely to cause a breach of the peace concerning some land within some one else's jurisdic-

1. (1902) I.L.R. 26 M. 188. 2. (1895) I.L.R. 22 C. 898.

Chellapathi Naidu v. Subba Naidu

tion," and I propose to use my powers to prevent it," wich is almost an absurdity. The learned Sub-divisional Magistrate has, I think, felt the difficulty of his position, as in his order purporting to be made under S. 145 (1), he has said that the land is within his jurisdiction "as per the proceedings of the District Magistrate". Now in this Presidency a District Magistrate may post one Sub-divisional Magistrate to charge of another Sub-division; but he has no power to alter the boundaries of any Sub-division of his district permanently, temporarily or for the purpose of a particular case. No order of the District Magistrate could have brought the land with which we are concerned within the local jurisdiction of the Sub-divisional Magistrate of Tri-vellore. That being so, I think it is clear that the Sub-divisional Magistrate's order under section 145 (1) in this case was without jurisdiction, and it follows that his whole proceedings were without jurisdiction. There does not appear to be any direct authority on this point, but *Konda Reddi* v. *King Emperor*,[3] which deals with a somewhat similar provision in section 107 of the Code, takes in effect the same view of the matter as I have done.

I may add that in this case, even if the learned Sub-divisional Magistrate's order had not been without jurisdiction, it would have been necessary to send the proceedings back to him in order that he might write a proper judgment in the case. What he has done is, when he came to the end of his inquiry, to fill up Form 22 in Schedule V of the Code, which is in the nature of a decree, and leave the mater there without any explanation of his reasons or his view of the evidence put before him. It would be very convenient to Magistrates if they could be allowed to dispose of such cases in that way, but there can be no doubt that it is their duty to write an order or judgment which shows that they have considered the contentions of the parties and the evidence put before them and which gives the reasons for their decision. There is nothing in S. 145 to absolve a Magistrate from that ordinary duty.

The whole proceedings of the Sub-divisional Magistrate in this case are set aside.

N. S. *Petition allowed.*

---

3. (1917) I.L.R. 41 M. 246.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Bombay.]

PRESENT:—LORD SHAW, LORD BLANESBURGH AND LORD SALVESEN.

Parashuram Detaram Shamdasani and another .. *Appellants** (*Plffs.*)

v.

The Tata Industrial Bank, Ltd., and others .. *Respondents* (*Defts.*).

P. C.

Parashuram Detaram Shamdasani *v.* The Tata Industrial Bank, Ltd.

Companies—Amalgamation—Scheme of, by which one company takes over the undertaking of another—Validity—Test of, as regards transferor and transferee companies—Distinction—Indian Companies Act, S. 213—Appointment of liquidators pursuant to scheme of amalgamation—Shareholders of transferor company—Suit by, against transferor and transferee companies and liquidators, for declaration of invalidity of amalgamation and of appointment of liquidators—Suit by them in their personal capacity—Scope of—Reliefs claimable in—Transferee company—Reliefs claimable against.

A scheme of amalgamation by which company *B* takes over the undertaking of company *A* does not depend for its validity upon the constitution of company *A*. It rests upon statute, and the only question, so far as company *A* is concerned, is whether the scheme is authorised by S. 213 of the Indian Companies Act. Where company *B* as purchasers were not proceeding under S. 213, the issue whether the amalgamation is binding upon them depends not upon the section but upon the question whether that company is by its constitution empowered to effect the acquisition in question.

The two appellants, who held 105 out of 1,000,893 shares in company *A*, sued company *A*, its "ostensible liquidators," and company *B*, which had, under a scheme of amalgamation, taken over the entire undertaking of company *A*, exclusive only of its uncalled capital, *inter alia*, for declarations that the appointment of the "ostensible liquidators" was invalid, and that the amalgamation agreement was not binding on the members of company *A* or on the plaintiffs. The plaint also asked that the agreement should be ordered to be delivered by company *B* to the plaintiffs for cancellation and for other consequential relief. In the first instance the suit was representative, the two appellants as plaintiffs purporting to sue on behalf of themselves and other shareholders of company *A*. On application made to the Court, however, under Order 1, Rule 8 of the Code, permission so to sue was refused and the suit proceeded as one personal to the plaintiffs alone.

Held that, in view of the extremely special character of the suit, the plaintiffs' competent claims were narrowly circumscribed.

The plaintiffs' claims had, to be valid, to be in respect of some right personal to themselves as shareholders in company *A*; they must not be in respect of any matter which was within the cognizance of a majority of the shareholders, unless in acting in the manner complained of such majority had acted either fraudulently, tyrannically or arbitrarily. As against company *B*,

*P.C. Appeal No. 94 of 1926. 8th May, 1928.

P. C.

Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.

the purchasing company, the actionable claims of the plaintiffs were even further circumscribed. These could not extend beyond claims which would be competent to company *A* itself if that company were plaintiff and were putting them forward.

Company—Meeting of—Notice of business to be transacted at—Insufficiency of—Shareholder's right to complain of—Knowledge prior on his part of business to be transacted—Effect—Hearing at meeting—Denial to shareholder of—What amounts to—Sense of meeting against hearing him further—Shareholder in question with knowledge thereof desisting from making further efforts to be heard—No denial of hearing in such a case.

A shareholder of a company who knew even before a meeting of the company was held everything about the business to be transacted at the meeting cannot complain of the notice or the circular convening the meeting on the ground of insufficiency

Where the question was whether a shareholder of a company was denied a hearing at a general meeting of the shareholders of the company, and it appeared that there was no organised opposition against him, but that, knowing that there was a very clearly expressed inclination by the other shareholders of a desire not to hear the shareholder in question further, the latter desisted from any further effort to make himself heard, *held,* that the complaint of a denial of hearing was, in the circumstances, not well founded.

Companies Act, S. 213—Liquidators appointed for winding up and amalgamation—Resolution appointing, restricting them in the exercise of their statutory duties—Irregularity of—Objection to—Maintainability of, after lapse of time and where no injustice has resulted from it

A liquidator in a voluntary liquidation, which is an essential condition of an amalgamation scheme under section 213 of the Indian Companies Act, 1913, must not by the resolution appointing him be restricted in the exercise of his statutory duties A resolution appointing liquidators under which in terms they become merely ministerial officers required to have regard to the supervision of the Directors of the two companies in discharging their duties, is highly objectionable.

An objection to the liquidators' appointment on the ground of the form of such a resolution will not, however, be allowed to be taken nearly five years after the event, when the irregularity has not produced any injustice whatever.

Appeal No. 94 of 1926 from a judgment and decree, dated the 22nd July, 1924 of the High Court of Judicature at Bombay (Sir Lallubhai Shah, Acting Chief Justice and Mr. Justice Fawcett) confirming a decree, dated the 14th December, 1923 of Mr. Justice Pratt passed on the Original Civil Side of the High Court of Judicature at Bombay.

The material facts of the case appear sufficiently from their Lordships' judgment, and also from the reports of the case in the Court below : see 26 Bom. L.R. 987.

Mr. Justice Pratt, in dismissing the plaintiffs' suit, made some pertinent observations which are well worth reproducing

P. C.

Parasuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.

in extenso, as they have hitherto not been reported. The learned Judge said:

"Mr Shamdasani had fought a hopeless suit with the energy and perseverance which compels admiration. It is only fair to him that I should say that I am not satisfied that there was not some justification for his attack upon the Company. I do not for a moment suggest that the scheme was not a sound business proposition, for that is not a matter for the Court to consider. But I do say that the speech of the Chairman moving the resolution was an insult to the intelligence of the shareholders. The Chairman was probably a puppet chairman, for he has not appeared in the witness box to justify the meeting over which he presided Either of ignorance or of design he refrained from giving the shareholders any information. He told a tale of woe singularly at variance with the re-assuring circular issued by order of his Board in the preceding month. He said not a word to explain the financial aspects of the scheme, to explain the calculations on which the proportion of the shares had been agreed to, or to justify the agreement as one that was fair to the Bank. It is difficult to believe that business of such importance was ever moved at a meeting of shareholders in so vapid and uninforming a speech. In this city where the business of Joint Stock Companies is conducted under the Managing Agency System, it is of the greatest importance that the shareholders should take a personal interest in the management. Under this system a firm of financiers engrafts itself into the vitals of a Company by making its employment one of the Articles of Association. It usurps the functions of management, which properly belongs to the Directors. It may be either a source of strength supplying the Company with finance; on the other hand it may be a parasite draining the Company of its life-blood. There is always the danger of the Managing Agents sacrificing the interest of the Company to their own interests and when the same firm manages companies whose interests conflict, the interests of some one Company must be sacrificed. I do not for a moment suggest that this is what has happened here. But there is always the possibility of a firm of the highest integrity being embarrassed by a vicious system, and the point I wish to make is that where this system prevails a vigilant and energetic shareholder like Mr. Shamdasani would be a public benefactor.

If Mr. Shamdasani had criticised the vapid speech of the Chairman and asked the shareholders to reject the resolution unless fullest information was given, he would probably have succeeded in procuring an intelligent examination of the scheme. He has only himself to thank for his failure; for instead of approaching the subject in the helpful and constructive spirit of a businessman, he adopted the barren, non-co-operative and destructive methods of a hedge-lawyer. He attempted to prevent the meeting from being held at all and the disgusted shareholders told him that he was a nuisance and a curse."

P. D. Shamdasani, appellant, in person.

Lowndes, K. C. and *Cecil W. Turner* for respondents.

8th May, 1928. Their Lordships' judgment was delivered by

Lord Blanesburgh.

LORD BLANESBURGH.—The Tata Industrial Bank, Limited, was in the year 1917 incorporated under the Indian Companies

P. C.

Parashuram Dotaram Shamdasani v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh

Act, 1913, for the purpose of carrying on the business of banking in all its branches. It had a nominal capital of 12 crores of rupees, divided into 1,600,000 shares of Rs. 75 each. In July, 1923, 1,000,893 of its shares were in issue, and on each of them the sum of Rs. 22.8 had been paid up. There was therefore an uncalled liability of Rs. 52.8 on every issued share. In July, 1923, the first appellant was the holder of 100 of these 1,000,893 shares, and second appellant was the holder of 5. The relatively trifling amount of these holdings constitutes a circumstance of relevance at many stages of this case.

It seems to be accepted on all hands that for some years prior to July, 1923, the Tata Bank had been losing ground. It is in evidence that its deposits had in 2½ years sunk from 12 crores to 3½ crores. Its industrial banking business had been so unprofitable that about a year before it had been given up, leaving the Bank in possession of a considerable block of industrial securities largely depreciated and difficult to realise. There had been an agitation against the Bank—partly patriotic—a Bank built up with Indian money should be run by Indians—partly carried on by persons who had grievances, real or supposed, against the Board. Amongst the disaffected was the first appellant, who, having been in the service of the Bank, had had his employment terminated by the general manager without due cause, as he alleged. In consequence, so it was rightly or wrongly suggested, he adopted an attitude of hostility to the Board. He had appeared at the general meeting of the shareholders on the 1st of May, 1923, and having, as he complained, been then denied a hearing, he instituted, with his brother, the second appellant, a suit against the Bank for redress on that score—a suit which had been dismissed by Pratt, J., in June (see *Parashuram* v. *Tata Industrial Bank, Ltd.*[1]), in a judgment which gravely questioned the *bona fides* of the appellants in bringing it. It was stated in evidence that in July the Bank was moribund : that it would have had to close in a few months if something drastic had not been done to save the situation. This may be, probably was, an exaggeration. But public confidence in the Bank had been, it would seem, weakened, if not destroyed. Some form of reorganisation was necessary. So much seems to be conceded on all hands. The choice lay between liquidation, reconstruction and amalgamation. Here there was a difference of opinion. The first appellant in a long open letter to the shareholders, on the 14th July, 1923—a letter to which

1. (1923) I.L.R. 47 B. 915.

P. C.

Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

reference must again be made in another connection—advocated reconstruction, with liquidation as a second alternative. The views of the Directors were not at first at one. But, after withdrawal from the Board of two of them—embarrassed it would seem by divided interests—the remaining Directors unanimously resolved that amalgamation with the Central Bank of India, Limited, upon terms which the Directors of that Bank had previously either proposed or provisionally agreed to, was the solution of the troubles of the Tata Bank most to be favoured. Accordingly, having caused to be entered into a conditional agreement for amalgamation with the Central Bank, the Directors of the Tata Bank decided to submit it for the approval of their shareholders as a scheme of amalgamation under S. 213 of the Indian Companies Act.

The Central Bank had been incorporated in 1911 under the Act of 1882. It had been established with a Head Office at Bombay for the purpose of carrying on the business of banking in all its branches. Its capital was much less than that of the Tata Bank, consisting of 3 crores only, divided into 600,000 shares of Rs. 50 each. Of these shares, in July, 1923, 200,000 had been issued, and each was paid up to the extent of Rs. 25. The Central Bank was vigorous, and its business was profitable. In July, 1923, it had a reserve of 30 lakhs of rupees—a circumstance the significance of which, as it seemed to their Lordships, was somewhat missed by the appellant in his argument before the Board. In the Central Bank the first appellant was the holder of five shares. There were many persons, apparently, who like him had shares in both Banks.

The conditional agreement for amalgamation was dated the 5th July, 1923. It provided for the Tata Bank going into voluntary liquidation with a direction to its liquidators to adopt the agreement and carry it into effect. It envisaged the increase of the nominal capital of the Central Bank to 3½ crores, so as to bring into existence shares of that Bank sufficient in number for the service of the agreement. It provided for the transfer to the Central Bank of the entire undertaking of the Tata Bank, exclusive only of its uncalled capital; and here it may be observed, in passing, that the assets to be transferred are expressed with a generality sufficient to include any misfeasance claims against the Directors or officers of the Tata Bank, if any such there were.

Part of the consideration for the transfer was to be the discharge by the Central Bank of all the debts, liabilities and engagements of the Tata Bank. Here again, it may be observed

P. C.
Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.
Lord Blanesburgh.

that while these liabilities were by a separate clause to include all claims against the Tata Bank for compensation in respect of loss of office or employment, the Directors of the Tata Bank were expressly excepted from the operation of this provision. A further part of the consideration was to be the payment of the costs and expenses incidental to the winding up of the Tata Bank and the carrying of the transfer into effect. As the residue of the consideration the Central Bank, in respect of every two shares held in the Tata Bank, was to allot to the nominee or nominees of every member of the Tata Bank who should require the Central Bank so to do, one share of that Bank of Rs. 50 with the sum of Rs. 25 credited as paid thereon, and ranking for dividend as from the 1st of July, 1923.

The supplemental provisions of the agreement were such as in these cases under the corresponding section of the Imperial Statute have been sanctioned by long usage and judicial approval. They were in every respect conceived in the interests of the Tata shareholders, whether accepting the scheme or dissenting from it, or neither accepting nor dissenting. As to dissentients, there was a special provision that the Central Bank would, without suit, pay each of them Rs. 15 for every share held by him in the Tata Bank, or, if such a sum were not acceptable, such a sum as by arbitration should be determined to be the proper price for his interest.

On the 5th July, 1923, notice convening an extraordinary general meeting of the Tata Bank shareholders for the 19th of July was, in due form, given. The meeting was to consider as an extraordinary resolution the winding up of the Bank with a view to the adoption by the liquidators pursuant to section 213 of the Indian Companies Act, 1913, of the conditional agreement for amalgamation just stated. In the notice a further intimation was given of a second extraordinary meeting to be held on the 6th of August for the purpose of confirming the extraordinary resolution as a special resolution and appointing liquidators. The notice was accompanied by a Directors' circular of even date. Of this circular much was made in the argument before the Board, and special attention to its terms is desirable.

The circular set forth the terms of the offer from the Central Bank so far as the issue of shares was concerned. It stated that the General Managers of the two banks, with the assistance of Messrs. A. F. Ferguson & Co., Chartered Accountants of both banks, and Messrs. S. B. Billimoria & Co., auditors of the Tata Bank, had examined the financial position of each bank, and that they were satisfied that the offer made by the Central Bank was

P. C.

Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

fair and that the value offered in exchange for the shares in the Tata Bank was just and equitable. The circular then set forth the joint certificate of Messrs. Ferguson and Messrs. Billimoria as follows:—

"We have examined the accounts of the Central Bank of India, Ltd., and of the Tata Industrial Bank, Ltd., as at 30th June, 1923, with a view to ascertaining their respective financial positions for the purpose of amalgamation. We are of opinion that a fair and equitable basis of amalgamation judged from our examination and in the light of the information and explanation we have received is that two shares of the Tata Industrial Bank are worth one share of the Central Bank."

The result of the amalgamation, it was then pointed out, would be that the uncalled liability of Rs. 105, which existed on two shares in the Tata Bank, would be exchanged for an uncalled or contingent liability of Rs. 25 in the Central Bank. The circular next referred to the conditional agreement of the 5th of July, 1923, and offered it for inspection at the bank's registered office; and it announced that if the proposed amalgamation were sanctioned it would be necessary for the Tata Bank to go into liquidation and for the liquidators to be authorised to adopt the agreement. The circular closed with a full reference to the rights of dissentients under section 213 of the Indian Companies Act, and called attention to the special provision with regard to these shareholders made by the conditional agreement.

It is in their Lordships' view impossible to read this circular without seeing that its purpose was to make the certificate of the two firms of accountants the pivot on which the wisdom of accepting the scheme was made to rest. And it is a most striking circumstance—the full implications of which seemed to be lost upon the first appellant—that, while for one reason or another he sought before their Lordships to impeach the scheme, he made no criticism upon the accountants or their competence, and disclaimed any aspersion upon their complete *bona fides* in giving their certificate. Nor has he offered any evidence or made any suggestions, on which judicial reliance can be placed, which in any way tend to discount its propriety or wisdom. Their Lordships can have no doubt that what commanded the overwhelming assent of the Tata Bank's shareholders was this unchallenged certificate : fortified it may be by a statement of the Managing Governors of the Imperial Bank of India, read by the chairman at the meeting of the 19th July, 1923, as follows:

"The Managing Governors of the Imperial Bank of India are of the opinion that the amalgamation is a good solution of the situation, and is also in the financial interest of the country."

P. C.

Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

At this meeting after a speech by the chairman, which has been criticised by the Trial Judge with quite unmerited severity, and after other incidents to which their Lordships must at a later stage return, the extraordinary resolution was carried with only three shareholders voting against it—two of these being the appellants. On a poll it was carried by 525,249 votes to 369.

The confirmatory meeting was duly held on the 6th August, 1923. At that meeting the extraordinary resolution was confirmed as a special resolution, only three shareholders again voting against it, and after some incidents to which their Lordships must also return at a later stage, the following resolution for the appointment of liquidators was declared to be duly passed with two dissentients:

"That Angus Gilchrist of Messrs. A. F. Ferguson & Co, Chartered Accountants, Shapurji Bomanji Billimoria of Messrs. S. B. Billimoria & Co, Public Accountants, Kaikhusru Nusserwanji Chandabhoy of Messrs. Chandabhoy & Jassabhoy, Associated Accountants, and Shapurji Nowroji Guzdar be appointed liquidators in the winding up for the purpose of adopting the agreement of the 5th July, 1923, and carrying the same into effect, with such, if any, modifications as the liquidators may think expedient, under the supervision of the Directors of the Central Bank of India Limited, and the Tata Industrial Bank Limited, the powers of the last mentioned of whom shall continue for the purpose of carrying the said agreement into effect and that the remuneration of the liquidators for their services be the sum of rupees five thousand."

Their Lordships have set forth now this resolution at length. Upon its terms they will have some comment to make hereafter.

On the 7th August, 1923, the conditional agreement of the 5th July, 1923, was by a supplemental agreement duly confirmed and made binding on both Banks, and the amalgamation so resolved upon has in fact been completely carried out and the Central Bank has been possessed of and has been carrying on the combined businesses as from the 1st July, 1923.

Such being its history in broad outline, their Lordships have been anxious to ascertain if there were objections of substance to the amalgamation so resolved upon. They have not been able to discover any. It was recommended by competent experts with exceptional means of knowledge whose impartiality has not been impugned. It accorded with the current quotations of the shares of both banks. By its provision for dissentients it gave to each shareholder in the Tata Bank who did not desire to join the new combine a value in cash for his interest which would not have been exceeded in amount after a long winding up had that been the alternative procedure resolved upon. It offered to the shareholders who were willing to come in the prospect, which

P. C.

Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

has not been disappointed, of an immediate resumption of dividends. More perhaps than all it relieved the shareholders from the burden of any immediate call—a necessary incident, probably, of any effective reconstruction scheme and a not unlikely incident if experience counts for anything of an ordinary liquidation.

But the scheme was not agreeable to the appellants, and the present suit was instituted by them in the High Court of Judicature at Bombay on the 29th August, 1923.

In the first instance the suit was representative, the two appellants as plaintiffs purporting to sue on behalf of themselves and other shareholders of the Tata Bank. On application made to the Court, however, under Order 1, Rule 8 of the Code, permission so to sue was refused, and the suit proceeded as one personal to the plaintiffs alone, a circumstance not to be lost sight of. The defendants were the Tata Bank, its "ostensible liquidators," and the Central Bank. By the plaint the appellants on the grounds there stated asked, as effective relief, for declarations that the resolutions just set forth were invalid and inoperative; that the appointment of the "ostensible liquidators" was invalid, and that the amalgamation agreement was not binding on the members of the Tata Bank or on the plaintiffs. They asked that the agreement should be ordered to be delivered by the Central Bank to them for cancellation and for other consequential relief. The plaintiffs, as will be gathered from what has already been stated, had many difficulties to overcome before so drastic an order could in the circumstances be made at their bidding. It is perhaps therefore not surprising that on the 14th December, 1923, the suit was dismissed by the learned Trial Judge, Pratt, J. That dismissal was, on appeal, confirmed by order of the Appellate Court on the 22nd July, 1924. It is from that order that the present appeal is brought.

The second appellant did not appear before the Board. The appeal was argued in great detail by the first appellant in person alone, and it is his case only which now calls for consideration.

It is the desire of their Lordships to deal, *seriatim*, with such of the many points raised by that appellant as survive for discussion. It is convenient, however, at once to advert to the extremely special character of the suit. In it the individual rights of the plaintiffs as shareholders in the Tata Bank are alone being asserted. It may, indeed, be doubted whether there are any other members of that Bank who are not now bound by

P. C.

Parashuram Detaram Shamdasan v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

the scheme either by acceptance or by dissent. Certain it is, that of the two shareholders called as witnesses by the plaintiffs one of them had accepted the scheme and the other had duly dissented therefrom. The plaintiffs' competent claims were therefore narrowly circumscribed. They had, to be valid, to be in respect of some right personal to themselves as shareholders in the Tata Bank; they must not be in respect of any matter which was within the cognizance of a majority of the shareholders, unless in acting in the manner complained of such majority had acted either fraudulently, tyrannically or arbitrarily. As against the Central Bank, the purchasing company, the actionable claims of the plaintiffs were even further circumscribed. These could not extend beyond claims which would be competent to the Tata Bank itself if that Bank were plaintiff and were putting them forward. Now these difficulties in the first appellant's way are in the present case on the facts already stated well-nigh overwhelming, and while their Lordships will examine the contentions put forward by him without further reference to them it must not be supposed that their Lordships consider them to have been overcome. They are merely, for convenience, held in reserve.

The first contention of the appellant was that the scheme of amalgamation was *ultra vires* of the Tata Bank altogether. For that purpose the memorandum and articles of association of the Bank were submitted by him to a rigid scrutiny with a view to show that such a scheme as that here resolved upon was not thereby authorised. With reference to this part of the appellant's argument it is enough to say that the scheme does not depend for its validity upon the constitution of the Tata Bank; it rests solely upon statute. The only question on this issue, so far as the Tata Bank is concerned, is whether the scheme is one authorised by section 213 of the Indian Companies Act and upon that question there can in their Lordships' view be no doubt that it was.

Inasmuch, however, as the Central Bank as purchasers were not proceeding under section 213, the issue whether the amalgamation is binding upon them depends not upon the section but upon the question whether that Bank is by its constitution empowered to effect such an acquisition as under the agreement of the 7th August, 1923, it proposed to effect. On this question, although the point was raised by the appellant, there is also no room for doubt. Their Lordships are in agreement with both

P. C.

Parashuram Detaram Shamdasan v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

Courts in India that the transaction was, so far as it affected the Central Bank, completely within its powers.

The next objection to the validity of the scheme was that sufficient information as to its real effect was not given to the shareholders by the Directors' circular and notice of the 5th July, 1923. Here the fact that the action is personal to the appellant is unfortunate for him. He at least knew before the first meeting everything about the scheme that was to be known. Indeed, on the 14th July, 1923, he addressed to the shareholders of the Tata Bank the open letter already referred to occupying ten pages of the Appendix and discussing the whole scheme with a particularity of detail which has hardly since been amplified. No possible complaint of the notice or circular on the ground of insufficiency is therefore open to him. But their Lordships do not desire it to be supposed that in their judgment either the notice or the circular of the 5th July was in any way questionable. Elaborate detail in such a public circular, while it would not be informing to the Tata Bank shareholders, might well be detrimental to the interests of their undertaking, which was still to continue. Doubtless it was for this reason, possibly it may be at the instance of the Directors of the Central Bank, that the circular was focussed upon the accountants' certificate, while offering to the shareholders inspection of the amalgamation agreement—an agreement entirely usual in its terms—and their Lordships are not surprised that, except from the appellant who was himself cognizant of every detail in connection with the scheme, no complaint of the sufficiency of the notice by any person or from any quarter has been brought to their attention.

But the substantial gravamen of the appellant's case was that the scheme was invalid, in that it involved, as he said, the issue at a premium to the Tata shareholders of Central Bank shares, a phrase by which he described the fact that the net value of the assets transferred to the Central Bank exceeded the amount credited as paid up on the shares issued by way of consideration to the Tata Bank shareholders. But it was the whole basis of the scheme that this should be the result. Necessarily so, if the amalgamation were to be in any way fair to the shareholders of the Central Bank. As has been shown, that Bank possessed a reserve fund of 30 lakhs. If their Lordships may, without prejudice, adopt the same phraseology, its issued shares stood in its accounts at a premium represented by that amount. If that premium was not to be swamped by the claims against it of the Tata Bank shareholders in respect of the Central Bank shares to

P. C.
Parasharam Detaram Shamdasani v. The Tata Industrial Bank, Ltd.,
Lord Blanesburgh.

be issued to them, it was essential that the Tata Bank assets brought in should represent a corresponding excess over the paid-up capital of the Central Bank given in exchange. And it was upon this principle that the amalgamation was based, and it was because it was so based that the auditors in good faith, as is admitted, were able to give the certificate they did. The whole argument of the appellant at this stage—and it was his one contention that had any substance—was really misplaced. He seemed to suppose that the transaction from the point of view of the Tata Bank shareholders was to be regarded as if it were one in which the consideration was either cash or was taken in shares of some company other than the Central Bank. This of course was not so. As a result of the amalgamation the bulk of the Central Bank's shares were to be held by the Tata Bank shareholders, who accordingly would not only retain in their proper proportion as against the Central Bank's original shareholders their interest in the Tata Bank assets they brought in, but would acquire in the like proportion an interest in the original assets of the Central Bank. In their Lordships' judgment the amalgamation on the basis on which it was rested could not, with justice, have taken any other form than in this respect it did take. The provision, on the accepted figures, was eminently fair, and it was open to no technical objection.

The next points taken by the appellant related to the proceedings at the meeting of the 19th July, 1923. In the Courts in India he had objected that two amendments then moved by him had been ruled out of order by the Chairman as incompetent. This point he did not raise before the Board, and the incident is only now relevant by reason of the fact that the appellant's first amendment was a reasoned statement against the proposed amalgamation and was in fact read *in extenso* to the meeting. This fact is of importance with reference to the appellant's remaining complaint, that the shareholders present refused to hear him when he sought to address them, and set forth his reasons for opposition to the resolution for amalgamation.

The situation at this stage cannot, their Lordships think, be judged accurately unless the circumstances of the moment are recalled. The appellant's attitude towards the Tata Bank, aggravated by his unsuccessful litigation just concluded, was well known to the shareholders present. His views on the whole subject had not only been expressed in the reasoned amendment just read out to the meeting, but had been set forth at length in

P. C.

Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

the open letter to the shareholders published by him some days earlier. On the evidence it appears to their Lordships that there was no organised opposition; there was a very clearly expressed indication by the shareholders that they did not desire further to hear the appellant, and what really happened was that the appellant desisted from any further effort to make himself heard, because even he realised that no further speech from him would be of any avail. In their Lordships' judgment nothing in the circumstances of the present case can be made of this point. The objection taken by the appellant to every vote tendered on the poll in favour of the resolution without further specification of reasons was, their Lordships think, unworthy of consideration. It was rightly ignored by the Chairman.

With reference to the proceedings at the second meeting, the criticism made by the appellant before the Board was that the election of liquidators should have been made to depend on the result of a poll taken but not announced, and should not have been made as the effect of a compromise agreed to by all the shareholders present other than the appellants. There might have been more substance in this objection if it did not appear from the minutes of the meeting that the appellant himself opposed the resolution on which the poll was taken. Having himself opposed it, he has no individual cause of complaint that the resolution was not in the event accepted.

There is, however, an objection to the appointment of the liquidators more serious than that taken by the appellant. The resolution appointing them has already been set forth, and it is, as will be seen, a resolution under which in terms they become merely ministerial officers required to have regard to the supervision of the Directors of the two companies in discharging their duties. And in the present case two of the liquidators so appointed were removed from office by the Court (*Kaikhusru Nusserwanji* v. *Tata Industrial Bank, Ltd.*[2]) for the reason that against the will of their co-liquidators and the directors they desired to inspect the books and inquire into the transactions of the Bank. Their Lordships think it right to say that a form of appointment which was relied upon even as partly instructing such a result is much to be deprecated. They hope that it has not been generally followed in India, and they think that the form should never again be used.

So great was the importance at one time attached in England to the consideration that arrangements of a Company's

2. (1924) I.L.R. 48 B. 471 at 485.

P. C.

Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

affairs should not when made effective preclude all proper inquiry into the past, that the Court, in cases where its sanction to the arrangement was necessary, used to insist, as a condition of its sanction, on the insertion in the scheme of provisions for meeting the expense of any such inquiry. That practice no longer obtains, and where, as in a scheme like the present, the amalgamation becomes effective without judicial sanction, no opportunity of imposing any such condition is given to the Court. But the counterpart of that old practice, as applied to amalgamations like this, is, that the Court, when, as in this case, it has the opportunity of doing so, will always cause it to be clearly understood that a liquidator in a voluntary liquidation, which is an essential condition of such an amalgamation, must not by the resolution appointing him be restricted in the exercise of his statutory duties. The resolution of appointment in the present case was highly objectionable.

The appellant was very insistent that this objection taken to the liquidator's appointment, although not previously raised, should now be made open to him by amendment. Their Lordships do not agree. It would, they think, be disastrous in this case if such an objection taken, nearly five years after the event. should now be entertained. The provisions of the appointment which are objectionable could at once have been corrected if attention had been timeously drawn to them, and notwithstanding some of the observations of Macleod, C. J., in the case last mentioned, with which their Lordships are not in agreement, it is not unlikely that the order then made by him was fully justified on other grounds, and, even if that be not so, it has not been shown that in the present case the irregularity has produced any injustice whatever.

It only remains to consider the question whether the appellant should have been permitted by the Trial Judge to introduce by amendment into his pleadings a direct allegation of gross fraud against the Directors of the Tata Bank. That amendment in their Lordships' judgment was rightly refused. They are on this point in entire agreement with both Courts in India, and they do not consider it necessary further to elaborate their reasons for that agreement.

The appeal, in their judgment, fails.

The appellant was very insistent that even if his appeal were not acceptable some special indulgence should be extended to him in the matter of costs, specially having regard to the form of the resolution appointing the liquidators to which attention

P. C.

Parashuram Detaram Shamdasani *v.* The Tata Industrial Bank, Ltd.

Lord Blanesburgh.

has just been called. The appellant, however, gave no indication of any readiness on his part to discontinue this extensive litigation in which he has for so long been engaged. In these circumstances it would be unfair to the respondents that the appellant's failure on this most unnecessary appeal should not carry with it the usual consequences in the matter of costs.

Their Lordships, however, while disclaiming all sympathy with the appellant's attitude in this matter, desire to recognise the ability, courtesy, and excellent temper with which he argued his case before the Board. The whole subject of the appeal was highly technical, the appellant's knowledge of the law applicable was extensive if not always well directed, and his statement of his position in a language not his own was remarkably clear. Their Lordships cannot but regret that so much industry had not been reserved for a less barren controversy. On the whole case their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitors for appellants : *McKenna & Co.*

Solicitors for respondents : *Ranken Ford & Chester.*

K.J.R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the Registrar of the Privy Council in the matter of taxation of costs.]

PRESENT:—LORD SHAW, LORD BLANESBURGH AND SIR LANCELOT SANDERSON.

Parashuram Detaram Shamdasani and another .. *Appellants**

v.

The Tata Industrial Bank, Ltd., and others .. *Respondents.*

P.C.

Parashuram Detaram Shamdasani *v.* The Tata Industrial Bank, Ltd.

Privy Council—Appeal—Costs of—Taxation by Registrar of—Appeal to Board from—Maintamability—Points not taken before Registrar—Raising of, before Privy Council not permitted.

The Board is not a taxation tribunal It only deals with such matters by way of appeal from the judgment of the Registrar upon items to which objection was taken before him. With regard to such items, he exercises his discretion and he gives effect to the authorised scale of fees and to modern practice. If he errs in any particular an appeal may lie to the Board—a rare occurrence; but apart from such an appeal the Board will not interpose. If fresh points of objection to the costs are stated before the Board, they cannot be entertained.

Appeal against the taxation of costs by the Registrar of the Privy Council.

---

*P.C. Appeal No. 94 of 1926 21st June, 1928.

P. C.

Parashuram Detaram Shamdasani v. The Tata Industrial Bank, Ltd

Lord Shaw.

P. D. Shamdasani in person.

Sir George Lowndes, K. C. and *C. W. Turner* for respondents.

21st June, 1928. Their Lordships' judgment was delivered by

Lord Shaw.—This is an appeal with reference to the taxation of costs. This Board is not a taxation tribunal. It only deals with such matters by way of appeal from the judgment of the Registrar upon items to which objection was taken before him. With regard to such items, he exercises his discretion and he gives effect to the authorised scale of fees and to modern practice. If he errs in any particular an appeal may lie to this Board—a rare occurrence, but apart from such an appeal this Board will not interpose. It is accordingly clear that if fresh points of objection to the costs are stated before this Board, they cannot be entertained. The appellant has been heard in person, and their Lordships are clearly of opinion that the objections taken before the Registrar were justly and with great propriety adjudicated upon by that officer. Accordingly the appeal with respect to the taxation of costs is dismissed.

There has been a further endeavour by two petitions to re-open the merits of this appeal. These petitions deal with matters already fully considered and disposed of on a previous petition after judgment. It is to be noted further that they also call in question the correctness of the judgment itself. On a previous occasion the Board listened to a lengthy argument going so far as even to impeach the jurisdiction of this tribunal, before which the appellant had appeared in person and argued his case at great length. The indulgence granted to the appellant cannot be further extended. In their Lordships' opinion the Registrar rightly rejected the petitions, which are an abuse of the process of the Board, and the motions are accordingly dismissed.

Solicitors for appellants : *McKenna & Co.*

Solicitors for respondents : *Ranken Ford & Chester.*

K. J. R. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

Mannen Venkayya and others .. *Petitioners** (*Accused*).

Venkayya, *In re.*

Abkari Act (I of 1866), S. 64—Acts of servant of renter or licensee—Liability of renter or licensee, when arises—Coolies directed to take toddy

*Cr.R.C. No. 1021 of 1927 28th March, 1928.
Cr.R.P. No. 918 of 1927.

to a particular shop—Coolies taking the toddy to another shop—Renter, if guilty—Trying Magistrate receiving notes of arguments from the prosecution after close of case without notice to the defence—Grave irregularity—Conviction if can stand. Venkayya, *In re.*

If the act done by the servant of a renter or licensee is one which is done in the course of business, the master would be presumed to have given authority under S. 64 of the Abkari Act. But, where coolies were asked to take toddy to shop No. 1 and they took it to shop No. 3, it cannot be said that the renter or licensee is liable for their act, for he could not have presumed or known that they were going to carry the toddy to No. 3 shop instead of No. 1 shop, and consequently the renter cannot be said to be guilty under section 64.

Where the trying Magistrate, after the close of the case, received from the Sub-Inspector in charge of the prosecution, a memo of arguments without notice to the defence and gave judgment convicting the accused,

Held, that the action of the Magistrate amounted to a grave irregularity and the whole proceedings and the conviction must be set aside.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-divisional Magistrate of Bezwada, dated 3rd October, 1927 and passed in C.A. No. 41 of 1927 (C.C. No. 445 of 1926 on the file of the Court of the Stationary Sub-Magistrate of Bezwada).

V. L. Ethiraj and *N. Somasundaram* for petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER.—This is an application to revise the order of the Sub-divisional Magistrate, Bezwada, in Criminal Appeal No. 41 of 1927 affirming the conviction of the petitioners under S. 64 of the Abkari Act. The first point raised before me is that the trying Magistrate, after the close of the case, received from the Sub-Inspector in charge of the prosecution a memo of arguments without notice to the defence and gave judgment. The second point urged is that there is no evidence to connect the 3rd accused with the offence and as regards accused Nos. 1 and 2 they did what they were told to do by accused No. 4, who has been acquitted. The 3rd accused is a license-holder of toddy shop No. 1. Accused 1 and 2 who were coolies were asked to transport some toddy to No. 1 shop. They took the toddy to No. 3 shop, where they were arrested by the Abkari Officer. Their contention that they acted under the orders of accused 4 and that they did not know where toddy shop No. 1 was, was disbelieved by both the Courts. Under S. 55, any one who imports, exports, transports or possesses liquor or any intoxicating drug without proper license is guilty of an offence

Venkayya, *In re.*

under section 64. The permit, which accused 1 and 2 had, mentioned the place where shop No. 1 was situated. They could not, therefore, be said to have acted *bona fide* in carrying the toddy to shop No. 3. Therefore they are guilty under S. 64.

As regards accused 3, there is no evidence that he either directed accused 1 and 2 or permitted them to take or connived at their taking the toddy to No. 3 shop.

The Public Prosecutor relies upon section 64 and contends that the presumption is that any act done by the servant of a renter or licensee for the benefit of such a renter or licensee would make the renter or licensee liable under the Act. No doubt if the act is one which is done in the course of business, though the act is done by the servant, the master, *i.e.*, the licensee, would be presumed to have given authority under section 64. But where coolies were asked to take toddy to shop No. 1 and they took it to No. 3 shop, it cannot be said that the renter is liable for any act of theirs, for he could not have presumed or have known that they were going to carry the toddy to No. 3 shop instead of No. 1 shop. As a permit was given and the permit mentioned sufficient particulars as to where the shop was, I do not think that the renter is liable for the deviation of accused 1 and 2 from the instructions given to them by the permit, as well as from the practice they knew was prevailing with regard to the business of accused No. 3. In the light of the evidence adduced, I do not think that accused No. 3 is guilty under section 64. I, therefore, set aside his conviction. As regards accused Nos. 1 and 2, no doubt as I have observed already, they are guilty under section 64. But considering the grave irregularity which the Trial Court committed in receiving the memo of arguments on behalf of the prosecution, especially without the knowledge of the accused, the question is whether the conviction ought to be allowed to stand. This Court has condemned in more cases than one the practice of allowing a counsel or a vakil to file a memo of arguments in writing. The practice seems to prevail in several places. The only way to put an end to such practice is by setting aside all the proceedings as being highly irregular. On this ground alone, I set aside the conviction of accused Nos. 1 and 2 and order a re-trial. The learned Public Prosecutor says that the Appellate Magistrate has drawn attention to the irregularity and that is quite sufficient. I do not think that is quite sufficient. There is often a tendency to add to the notes of argument a few lines here and there and make it the judgment of the Court. Such would not

in any sense be the judgment of the Court. I cannot express myself too strongly on this highly improper practice of Courts allowing written notes of arguments to be filed. The attention of the District Magistrate will be drawn to the conduct of the Sub-Magistrate in this case.

The fine, if paid, will be refunded to the accused.

N.S. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE.

Molaiappa Goundan .. *Petitioner* (Accused).*

Penal Code (XLV of 1860), S. 290—Prosecution under—Liability for—Joint owner of property not in actual possession of same—Liability of—S. 268—Public nuisance—Allowing prickly pear to spread on to a public road if a—Prosecution for—Right to institute—Local Fund Overseer—Prosecution by, as such—Legality of—Complainant—Sworn statement from—Omission to take—Irregularity or illegality.

A joint owner is responsible in law for nuisance caused by his property. One of two brothers jointly owning a property is liable to be convicted under S. 290 of the Penal Code for causing a public nuisance by allowing prickly pear to spread from that property on to the public road, notwithstanding that the property was at the time in the actual enjoyment of the other brother.

Allowing prickly pear to spread on to a road used by the public is a public nuisance within the definition in S. 268 of the Penal Code.

Any member of the public has a right to complain of a criminal offence. And a Local Fund Overseer has, as a member of the public, though not by virtue of his official position, a right to launch a prosecution against a person allowing prickly pear to spread from his property on to a public road. The fact that the Local Fund Overseer did not purport to complain as an ordinary person is immaterial.

Omission to take a sworn statement from a complainant is an irregularity and not an illegality.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, and section 107 of the Government of India Act, 1915, praying the High Court to revise the judgment of the Court of the First Class Bench of Magistrates, Dharapuram, in Summary Trial No. 1309 of 1927.

Watrap S. Subramania Aiyar for petitioner.

The Public Prosecutor on behalf of the Crown.

---

*Cr.R.C. No. 214 of 1928. 15th August, 1928.
Cr.R.P. No. 162 of 1928.

Molaiappa Goundan, *In re.*

The Court made the following

ORDER.—Several points of law have been raised in this Criminal Revision case. The petitioner was charged on the complaint of the Local Fund Overseer, Dharapuram, with an offence under section 290 of the Indian Penal Code of causing a public nuisance by allowing prickly pear to spread from his own property on to the public road. He was convicted and fined, and now applies for revision of the conviction.

The first point argued was that the property from which the prickly pear spread is not his but his brother's. It is clear from the evidence including that of the defence witness that, although the property is in the actual enjoyment of his brother, both he and his brother are undivided and therefore both are still joint owners. A joint owner is responsible in law for nuisances caused by his property.

The next point is that the act or omission is not a public nuisance, the argument being, that it is the duty of the Local Board and not of the owner of the adjoining property to keep prickly pear from spreading on the road. No ruling in point is cited to me in support of that view. The principle governing the case seems to me to be the general principle that no man shall so use his property as to injure his neighbour, and it makes no difference that the neighbour is the public and not an individual. Under section 268 of the Indian Penal Code a person is guilty of a public nuisance who does any act or is guilty of an illegal omission which . . . . must necessarily cause obstruction to persons who may have occasion to use any public road, and 'illegal' under section 43 applies to everything which is an offence or is prohibited by law or which furnishes a ground for a civil action. I am of opinion that allowing prickly pear to spread on to a road used by the public is a public nuisance within this definition.

The next point is whether the Local Fund Overseer had any legal authority to launch a prosecution against the petitioner under the Indian Penal Code. It is pointed out that section 162 of the Local Boards Act provides a detailed procedure designed *ad hoc* for the removal of prickly pear spreading from private property on to public roads, and it is contended that the enactment of that procedure impliedly deprives Local Boards and their servants of the right to prosecute under the Indian Penal Code. I am clear that such a right, if it existed, cannot be impliedly taken away by the provisions of another statute, nor is any ruling cited which goes so far. The case in *Chandi*

Molaiappa Goundan, *In re.*

Pershad v. *Abdur Rahman*[1] is not really in point. There a party was being prosecuted under S. 182 or S. 199, Indian Penal Code, for making a false statement of the number of carriages and ponies possessed by him in an application for license for vehicles and animals. The High Court held that the Indian Penal Code had no application as the Municipal Act was complete in itself and attached no penalty to the making of a false statement in such an application and that, therefore, the party was under no obligation of law to make a true statement. That ruling has no application to an act or omission which does itself come under the definition of a specific offence set out in the Indian Penal Code.

The question, therefore, is whether the Local Fund Overseer who launched the prosecution had legal authority to do so. It seems to me that he had the ordinary right of any person to complain of a criminal offence. Nor is that right taken away because he did not profess to complain as an ordinary person but as a Local Fund Overseer. For purposes of this complaint his official position may be neglected. He is a member of the public entitled to go on those portions of the road which had been encroached upon by the prickly pear and as such is entitled to complain.

It is then argued that since he was not examined on oath as a private complainant should be, the proceedings are illegal. Again I am not referred to any authority which goes so far. Omission to take a sworn statement from the complainant is under the law in this Presidency an irregularity and not an illegality. See *Queen-Empress* v. *Monu*[2] and *Ambayara Goundan* v. *Pachamuthu Goundan.*[3] I am unable to see how that omission in this case has prejudiced the petitioner.

I therefore see no reason to interfere in this case and dismiss the petition. I should, however, add that I think it would be better that all such cases be dealt with under the relevant sections of the Local Boards Act which ensures that the Local Board as a whole considers the case one which should be prosecuted, and I recommend the Board to follow that practice in future.

A.S.V. *Petition dismissed.*

---

1. (1894) I.L.R. 22 C 131.
2. (1888) I.L.R. 11 M. 443.
3. (1923) 19 L.W. 461.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE REILLY.

The President, Union Board, Tirukurangudi, S. V. Piravi Perumal Pillai .. *Petitioner** (*Complainant*)

v.

Narayana Nadar and others .. *Respondents* (*Accused* 1 *to* 6, 8 *to* 11 *and* 14 *and* 15).

The President, Union Board, Tirukurangudi v. Narayana Nadar.

Madras Local Boards Act (*V of* 1884), *S* 6 *and* (*XIV of* 1920), *Ss* 5, 207 *and* 232—*Limits of Union—Alteration of—Revenue village constituted as a Union—Enlargement of boundaries by the Board of Revenue—Effect on the boundaries of the Union—Madras Survey and Boundaries Act* (*IV of* 1897)—*Power of Survey Officer to fix the limits of a Union—Assessment of tax on house situate outside Union—Power of President to issue summons to the owner of the house to appear before him to be examined—Disregarding of such summons—If amounts to an offence.*

Under the Madras Local Boards Act of 1884, the limits of a Union can be altered only by the Government acting under section 6 of that Act, and under the same Act of 1920 such limits can be altered only by the District Board acting under section 5 of that Act with the approval of the Government.

Where a revenue village which was also constituted a Union by the Government under section 6 of the Madras Local Boards Act of 1884 was subsequently enlarged by the Board of Revenue so as to include another village,

Held, that it had not the effect of automatically enlarging the limits of that village as a Union so as to include the other village.

The Madras Survey and Boundaries Act of 1897 gives no power to fix the limits of a Union and the Survey Officer concerned has no power by his map or operations to alter the effect of a notification under the Madras Local Boards Act of 1884 declaring the limits of a Union.

A Union Board has no power to assess or collect house-tax on houses situate outside the limits of the Union and therefore the President of a Union has no power under section 232 of the Madras Local Boards Act of 1920 to summon a person to attend before him to be examined in respect of the assessment of his house situated outside the limits of the Union. The owner of the house disregarding such summons does not commit an offence under section 207 of the Madras Local Boards Act.

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Assistant 1st Class Magistrate of Tinnevelly in C.C. No. 3 of 1927.

---

*Cr.R.C. No. 995 of 1927.
Cr.R.P. No. 897 of 1927. 31st August, 1928.

The President, Union Board, Tirukurangudi v. Narayana Nadar.

K. V. Sesha Aiyangar for petitioner.

K. S. Vasudevan for *The Public Prosecutor* on behalf of the Crown.

N. Kunchitapadam Aiyar for respondents.

The Court made the following

ORDER.—For the petitioner, the President of the Tirukurangudi Union Board, it is contended that Nallamaram, where the respondents live, is within the limits of the Union, which the respondents deny. The Union was constituted by the Government in 1896 under section 6 of the Madras Local Boards Act, 1884. One of the villages then declared by the Government to form the Union was Sengalakurichi. It is admitted that Nallamaram was not then included in Sengalakurichi or in any of the other villages of the Union. But it appears that in 1910 the revenue village of Sengalakurichi was enlarged by the Board of Revenue so as to include Nallamaram. It is not suggested that any new or revised notification regarding the inclusion of Nallamaram in the Union was ever issued. But it is contended for the petitioner, that, when the Board of Revenue for another purpose enlarged the boundaries of Sengalakurichi, the whole of the village of Sengalakurichi so enlarged was automatically brought within the limits of the Union and that from that moment the Government's notification of 1896 declaring the limits of the Union must be read in this revised sense. I cannot accept that contention. Under the Madras Local Boards Act, 1884, the limits of the Union could be altered only by the Government acting under section 6 of that Act. Under the Madras Local Boards Act, 1920, the Act now in force, the limits of a Union can be altered only by the District Board acting under section 5 of that Act with the approval of the Government. Those provisions would be defeated if the Government or any other authority not proceeding under the Act concerned could modify the effect of a notification properly made under either Act regarding the area to be included in a Union by giving a new meaning to a village name used in such a notification so as to make it include a larger or smaller area than before. What the Board of Revenue thought fit to do in altering the limits of the revenue village of Sengalakurichi in 1910 for revenue purposes cannot have any effect on the notification issued by the Government in 1896 declaring the limits of the Tirukurangudi Union. As no notification has been issued under either the Act of 1884 or that of 1920 regarding the limits of the Union the notification of 1896 is still in force; and the villages

The President, Union Board, Tirukurangudi v. Narayana Nadar.

named in it must be understood to include for the purposes of the Union the areas included within their limits as they were at the time of that notification—no more and no less. Nallamaram, therefore, is not included within the present limits of the Union.

Mr. Sesha Aiyangar for the President of the Union has also contended that in 1920 there was a re-survey by the Survey Department, in the course of which a map of the Union was prepared, showing the whole of Sengalakurichi as enlarged by the Board of Revenue in 1920 within the limits of the Union, and that under the Madras Survey and Boundaries Act, 1897, under which that re-survey must have been made, the boundary of the Union so mapped cannot now be disputed. But the boundaries which became final under section 13 of that Act were, so far as Government land was concerned, the boundaries of the holdings of "registered holders" and not even the boundaries of revenue villages except so far as they were determined by the boundaries of such holdings. That Act gave no power to fix the limits of Unions. The Survey Officer concerned had no power by his map or operations to alter the effect of the notification of 1896 declaring the limits of the Union.

In this case the respondents, who reside in Nallamaram, have been prosecuted for committing offences punishable under section 207 of the Madras Local Boards Act, 1920, by failing to attend before the President of the Union Board in accordance with summonses issued under section 232 of the Act. Under section 232 the President "may summon any person to attend before him and to give evidence or to produce documents, as the case may be, in respect of any question relating to taxation, or to the grant of any license or permission under the provisions of the Act." Mr. Sesha Aiyangar contends that under that section the President of a Union Board can summon any person from any part of the Presidency to attend before him. But under the section a person can be summoned only "in respect of any questions relating to taxation or to the grant of any license or permission under the provisions of the Act." Ex. B shows that the respondents were summoned to appear before the President for examination in respect of the house-tax assessed on their houses in Nallamaram. But, as the Union Board had no power to assess or collect house-tax on houses outside the limits of the Union, in respect of the house-tax for the purpose of which the respondents were summoned to appear, no question relating to taxation under the provisions of the Act

could arise. The President had no power under section 232 of the Act to summon the respondents to attend before him to be examined in respect of the assessment of their houses in Nallamaram for house-tax, and they committed no offence by disregarding his summonses. Their acquittal was right, and this petition must be dismissed.

The President, Union Board, Tirukurangudi v. Narayana Nadar.

I may add that I do not understand how it was that all the respondents were tried together.

N.S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS.

The Official Receiver, Anantapur .. *Appellant* (*1st Respondent*)

v.

Ramachandrappa, minor by next friend Bala Nagamma, and others .. *Respondents* (*Petitioner and Respondents 2 to 5*).

Provincial Insolvency Act, Ss. 28, 2 (d)—Hindu Law—Joint family—Manager (not father) and adult members of—Insolvency of—Power of manager to dispose of family property for binding debts if vests in Official Receiver.

The Official Receiver, Anantapur v. Ramachandrappa.

Held, by Devadoss, J, on a reference under S 98, Civil Procedure Code:—Where, in a Hindu joint trading family, there are one or more minor members and the manager is not the father and the adult members including the manager have been adjudicated insolvents, the power of the manager to dispose of the joint family property for debts incurred for trading purposes passes to and becomes exercisable by the Official Receiver so as to bind the minors' shares.

Appeal against the order of the District Court of Anantapur in Interlocutory Application No. 129 of 1926 in Insolvency Petition No. 24 of 1924.

T. R. Arunachala Aiyar for *B. Somayya* for appellant.

V. S. Govindachar for 1st respondent.

The Court (Odgers and Curgenven, JJ.) delivered the following

JUDGMENTS. *Odgers, J.*—This is an appeal from the order of the District Judge of Anantapur on a petition under S. 65 of the Provincial Insolvency Act to set aside a sale with regard to

Odgers, J.

---

*A.A.O. No. 395 of 1926. 3rd April, 1928.

The Official Receiver, Anantapur v. Ramachandrappa.

Odgers, J.

a certain minor's share in the properties sold. The matter concerns a trading family and the debts have been incurred for the family trade. The Official Receiver sold the joint family properties for the benefit of the creditors. The joint family consists of the second and third insolvents and their undivided brother, the petitioner and another member, nephew of the first insolvent. The sole question in this case is whether the power of the second insolvent as the manager but not the father of the joint Hindu family vests in the Official Receiver to permit him to sell the share of the minor in the property. It is, of course, clear that the minor cannot be adjudicated an insolvent and in *Sanyasi Charan Mandal* v. *Asutosh Ghose*,[1] which was a case like the present of a minor partner in a family concern, it was held that the minor should not be adjudicated simply because there was a restricted remedy under the Contract Act against his share in the partnership. The Court expressly said that it would make no difference if it were a Hindu trading family. It is now settled by the Privy Council in *Sat Narain* v. *Behari Lal*[2] that it is not the share of the members of the joint family that vests in the Official Receiver but the power of the father to sell the shares of the other members under certain circumstances. Their Lordships lay this down perfectly clearly although they also make it clear that under S. 52 (2) of the Presidency Towns Insolvency Act or in some other way the property of the sons may be made available for payment of the father's just debts. That was explained by a Full Bench of this Court in *Seetharama Chettiar* v. *Official Receiver, Tanjore*[3] which was the case of a father. Krishnan and Ramesam, JJ., held that such a power vests in the Receiver under S. 28 of the Act as the insolvent's property and not as property under S. 2 (*d*), which was the view taken by Venkatasubba Rao, J. I do not understand the learned Judges to have based their decision exclusively on the fact that the manager in that case was the father, because it seems to me that if you can base the decision as the majority did on S. 28 of the Act, you are free from the definition in S. 2 (*d*), which says that property includes "any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit". It has been contended that in the face of that section it is only father's power that can possibly vest in the Official Receiver, namely, the right to sell the joint family pro-

---

1. (1914) I.L.R. 42 C. 225.
2. (1924) L.R. 52 I.A. 22: I.L.R. 6 Lah. 1: 47 M.L.J. 857 (P.C).
3. (1926) I.L.R. 49 M. 849: 51 M.L.J. 269 (F.B.).

perty for the payment of his own just debts. But I fail to see any difference in principle between that and the case of a brother (manager) who is justified in selling the joint property for paying the debts of the joint family business. The minor was interested in the business just as the manager was and if the manager can sell in order to preserve the business, it seems to me that he is exercising a disposing power which he may exercise for his own benefit. The Privy Council in *Sat Narain* v. *Behari Lal*[2] although they refer to the case in *Rangayya Chetti* v. *Thanikachalla Mudali*[4] later on say that it was decided under a different statute and that *Sanyasi Charan Mandal* v. *Asutosh Ghose*[1] was a partnership case and these are not directly in point. In the first of these cases, Subrahmanya Aiyar, J., following *Fakirchand Motichand* v. *Motichand Hurruckchand*[5] held that the Official Assignee could convey the share of the sons in the joint property but not the share of the brother. It seems to me that once you get the idea admitted of the power of disposition over the property of the insolvent which is clearly established in *Sat Narain* v. *Behari Lal*[2] and *Seetharama Chettiar* v. *Official Receiver, Tanjore*[3] there is no difference between the power of the manager if he is a father and the power of the manager when he is a brother or other relation even in the case of a minor partner who cannot be adjudicated. I am supported in this view by a very recent decision of Waller and Madhavan Nair, JJ., in A. A. O. No. 31 of 1925 which was a case of a brother or paternal cousin in which they say the power of the manager to deal with joint family property vests in the Official Receiver, relying on the observations of Subrahmanya Aiyar, J., in *Rangayya Chetti* v. *Thanikachalla Mudali*[4]. I would therefore hold that the learned District Judge is wrong and that the Official Receiver, though he did not succeed to the managership of the family, had vested in him the manager's powers of disposition.

The Official Receiver, Anantapur v. Ramachandrappa. — Odgers, J.

The Civil Miscellaneous Appeal should therefore, in my opinion, be allowed with costs.

Curgenven, J.—The question we have to decide in this case is whether upon the manager of a Hindu family and some but not all the other members carrying on a family trade being

Curgenven, J.

1. (1914) I.L.R. 42 C. 225.
2. (1924) L.R. 52 I.A. 22: I.L.R. 6 Lah. 1: 47 M.L.J. 857 (P.C.).
3. (1926) I.L.R. 49 M. 849: 51 M.L.J. 269 (F.B.).
4. (1895) I.L.R. 19 M. 74.
5. (1883) I.L.R. 7 B. 438.

The Official Receiver, Anantapur v. Ramachandrappa.

Curgenven, J.

adjudicated insolvents, the Official Receiver can, under the Provincial Insolvency Act V of 1920, sell the whole joint family property including the shares of those not adjudicated. In the present case, the members adjudicated were an uncle and two out of three brothers, the third brother who was not adjudicated being a minor. In the order now under appeal the learned District Judge has held that the minor's share is not liable to be sold.

There is a clear distinction between the vesting of joint family property in an Official Receiver and the vesting of a power of disposal over that property. It has been held by the Privy Council in *Sat Narain* v. *Behari Lal*[2] that upon the adjudication of a Hindu father under the Presidency Towns Insolvency Act the property of the joint Hindu family consisting of himself and his sons does not thereby become vested in the Official Assignee but only the father's undivided share so vests; and this decision applies equally to an adjudication under the Provincial Act. *A fortiori* the rule holds good if we substitute a family manager other than a father for a father. This decision of their Lordships came under consideration in a recent Madras case, *Seetharama Chettiar* v. *Official Receiver, Tanjore*[3] where the question which arose was whether, upon a father's adjudication under the Provincial Insolvency Act, his power to sell his son's shares, as well as his own share, for paying his just and proper debts vested in the Official Receiver. The point raised being deemed one of considerable importance, a Bench consisting of three Judges (Krishnan, Ramesam and Venkatasubba Rao, JJ.) was constituted to decide it. They unanimously affirmed the proposition, agreeing that the Privy Council decision went no further than to lay down that the son's share did not vest, and left undecided this further point. Accepting then, as we must, the view of the insolvency law taken by this Full Bench, does it follow that the power of disposal of a manager of a Hindu family also vests, under the Provincial Insolvency Act, in the Official Receiver?

The point which the Full Bench had in effect to decide was whether the word "property" as used in S. 28 of the Provincial Act, included a father's disposing power over his son's share. "Property" is defined in S. 2 (*d*) as including "any property over which, or the profits of which, any person has a disposing power which he may exercise for his own benefit." Krishnan, J.,

2. (1924) L.R. 52 I.A. 22: I.L.R. 6 Lah. 1: 47 M.L.J. 857 (P.C).
3. (1926) I.L.R. 49 M. 849: 51 M.L.J. 269 (F.B).

The Official Receiver, Anantapur v. Ramachandrappa.

Curgenven, J

thought that there might be some difficulty in applying this definition because in the Lahore case their Lordships seemed to be of opinion that the similar definition in S. 2 (*e*) of the Presidency Towns Act contemplated only an "absolute and unconditional power of disposal," which a father's power is not; but he thought that section 28 was enough to vest the power in the Receiver as a species of property belonging to the father. Ramesam, J., who does not refer to the definition, seems to have been of the same opinion. Venkatasubba Rao, J., deemed the definition in section 2 (*d*) of the Provincial Insolvency Act to include "the qualified and restricted power of a Hindu father."

Whatever view be taken of the scope of the definition, it appears to me that by qualifying the words "disposing power" by the words "which he may exercise for his own benefit" the intention was to exclude a disposing power which the debtor was competent to exercise only in a representative capacity; and it can scarcely be gainsaid, I think, that a manager disposes of family property in this capacity. The judgment of Subrahmanya Aiyar, J., in *Rangayya Chetti* v. *Thanickachalla Mudali*[4] which has been relied upon in a case (A.A.O. No. 31 of 1925) recently decided by Waller and Madhavan Nair, JJ., has been criticised before us as not giving due weight to this distinction. The single insolvent had undivided sons and an undivided brother, and after holding that the insolvent had disposing power over his sons' shares, the learned Judge continues "Nor as to the 2nd defendant (the brother) am I able to see any sound distinction, in principle between his case and that of the other defendants (the sons) just referred to. For if the son's share is property which the father has power to dispose of for his own benefit, how can the share of any other undivided co-parcener, which the managing member can convey for debts incurred by him for legal necessity, be treated differently"? The distinction in principle is perhaps that the son's property is liable for the father's personal debts contracted for his own benefit so long of course as they are not contracted for purposes illegal or immoral, whereas as family manager, he can contract binding debts not for his own benefit but only for the benefit of the family.

In *Nunna Setti* v. *Chidaraboyina*[6] the question arose whether the undivided share of a minor co-parcener, son of one of the insolvents, vested in the Official Assignee. The judgment of Bhashyam Aiyangar, J., must be read subject to the observations

4. (1895) I.L.R. 19 M. 74.
6. (1902) I.L.R. 26 M. 214.

The Official Receiver, Anantapur v. Ramachandrappa.

Curgenven J.

made upon it by their Lordships in *Sat Narain* v. *Behari Lal*[2]; it was passed under a different statute, and need not be taken as authority under either of the present Insolvency Acts. I only wish to extract from it, here, the following remark of the learned Judge:—

"If the question were *res integra* and not covered by a course of judicial decisions, bearing upon the corresponding expression occurring in S. 266 of the Civil Procedure Code (now S. 60) I should entertain considerable doubt as to whether a power which, under the Hindu Law, a managing member of a joint Hindu family has over the interests and shares of the junior members in the family property, is within the meaning of S. 30 of the Insolvency Act, a power vested in the insolvent which he can lawfully exercise for his benefit."

Since the Privy Council have now deprecated the practice of deriving an analogy from S. 266 of the Civil Procedure Code and have upon this ground among others disposed of the cases which stood in the learned Judge's way, this observation is entitled, I think, to much weight as an expression of Bhashyam Aiyangar, J.'s personal opinion. *Official Assignee of Madras* v. *Ramachandra Aiyar*[7] is another case the authority of which has been affected by the Privy Council decision, for it lays down that an Official Assignee, in the case of a managing member's insolvency, can take possession of the family property, and of course it would follow that he has the power of sale in respect of debts binding on the family.

A case in which the contrary view was taken is *Sanyasi Charan Mandal* v *Asutosh Ghose*[1] also referred to in the recent Privy Council judgment. After considering the English case *Lovell and Christmas* v. *G. W. Beauchamp*[8] Mookerjee and Beachcroft, JJ., say :

"The decision of the House of Lords cannot, consequently, be rightly regarded as an authority for the proposition that in a bankruptcy proceeding it is open to the Court to direct the receiver to deal with assets other than those belonging to the persons who had been adjudged insolvents. It would indeed be surprising if the Court could, in a proceeding under the Insolvency Act, deal with the property of a person who had not been adjudicated an insolvent"

This statement of the law was approved in an offshoot of the same case, which came before the Privy Council in *Sanyasi Charan Mandal* v. *Krishnadhan Banerji.*[9]

1. (1914) I.L.R. 42 C. 225
2. (1924) L.R. 52 I.A. 22: I.L.R 6 Lah 1: 47 M.L.J. 857 (P.C.).
7. (1922) I.L.R. 46 M 54: 43 M.L.J. 567.
8. (1894) A.C. 607.
9. (1922) L.R. 49 I.A. 108: I.L.R. 49 C. 560· 43 M.L.J. 41 (P C).

The conclusion, which, with great respect to the learned Judges who have held otherwise I feel compelled to reach from this brief survey of the case-law and from a consideration of the definition of "property" in S. 2 (*d*) is that it is unwarrantable to extend the recent Full Bench decision so as to cover the insolvency not only of a father but also of a managing member. It may be said that a father, in respect of such of his own debts as are binding upon his sons, has a disposing power "for his own benefit" over the son's property, and that, therefore, the receiver has the same disposing power. The disposing power possessed by a managing member is not for his own benefit but for the benefit of the family, and such a power does not fall within the definition of an insolvent's property which, under section 28, will vest in the receiver. I would, therefore, confirm the learned District Judge's order setting aside the sale of the whole property and would dismiss the appeal with costs.

By Court.—As we have differed in opinion and the matter is one of importance and likely to recur, we decide to refer the following point of law under S. 98, Civil Procedure Code, to a third Judge for opinion, subject to the directions of the Honourable the Chief Justice:—

"In a Hindu joint trading family where there are one or more minor members and the manager is not the father and the adult members including the manager have been adjudicated insolvents, does the power of the manager to dispose of the joint family property for debts incurred for trading purposes pass to and become exercisable by the Official Receiver so as to bind the minors' shares?"

B. Somayya for appellant.

V. S. Govindachar for 1st respondent.

The Court (Devadoss, J.) expressed the following

OPINION.—This is a reference under S. 98 of the Code of Civil Procedure owing to a difference of opinion between brothers Odgers and Curgenven. The point referred is, "In a Hindu joint trading family where there are one or more minor members and the manager is not the father and the adult members including the manager have been adjudicated insolvents, does the power of the manager to dispose of the joint family property for debts incurred for trading purposes pass to and become exercisable by the Official Receiver so as to bind the minors' shares?" Both the learned Judges referred to almost all the cases on the point and it is unnecessary for me to discuss them in detail. It is well settled that under the Presidency Towns Insolvency Act the power of the father to dispose of

The Official Receiver, Anantapur v. Ramachandrappa.

his son's share for a debt which is neither illegal nor immoral on his becoming an insolvent vests in the Official Assignee. It was held by the Full Bench in *Balavenkata Seetharama Chettiar* v. *The Official Receiver of Tanjore*[3] that under the Provincial Insolvency Act (V of 1920), on the insolvency of a Hindu governed by the Mitakshara Law, his power to sell his sons' shares also for paying his just and proper debts vests in the Official Receiver; the sons' shares themselves do not vest in the Receiver.

The question is whether the same principle would apply to the case where the manager of a joint Hindu family is not the father. The power of the father to sell the sons' shares for his debts has been held not to rest solely on the pious obligation of the son to pay his father's debts. If that is so, it is difficult to see how the manager of a joint Hindu family stands on a different footing when the debts contracted by him are such as would bind the members of the joint family. In *Rangayya Chetti* v. *Thanikachalla Mudali*[4] the Official Assignee conveyed a house forming part of the family property of the insolvent to the plaintiff who sued for possession. The younger brother of the insolvent contested the suit. It was held that the Official Assignee could convey the shares of those persons upon whom the debts of the insolvent were binding. Subrahmanya Aiyar, J., after referring to the cases in *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas*[10] and *Fakirchand Motichand* v. *Motichand Hurruckchand*[5] observed at page 77, "Nor as to the second defendant am I able to see any sound distinction in principle between his case and that of the other defendants just referred to. For, if the son's share is property which the father has power to dispose of for his own benefit in the restricted sense explained by West, J., in the passage quoted above, how can the share of any other undivided co-parcener, which the managing member can convey for debts incurred by him for legal necessity, be treated differently? No doubt there is difference in the proof to be adduced as to the character of the debt in the two instances. But the essential element that the shares other than that of the transferee are liable to be proceeded against for the transferor's debt is common to both the cases. I must therefore hold that the Official Assignee has in law power to transfer not only the share of the insolvent, but also those of his co-parceners, whether

3. (1926) I.L.R. 49 M. 849: 51 M.L.J. 269 (F.B.).
4. (1895) I.L.R. 19 M. 74. 5. (1883) I.L.R. 7 B. 438.
10. (1886) I.L.R. 11 B. 37.

The Official Receiver, Anantapur v. Ramachandrappa.

they be his sons or brothers or other collaterals, provided of course the debts for which the property is disposed of, are shown to have been incurred for purposes binding upon them." This case was followed in *Nunna Brahmayya Setti* v. *Chidaraboyina Sanka Danayya.*[6] That was a decision of a Bench consisting of Bhashyam Aiyangar and Moore, JJ. Bhashyam Aiyangar, J., who delivered the judgment of the Court relying upon the decisions under S. 266 of the Code of Civil Procedure and after referring to *Fakirchand Motichand* v. *Motichand Hurruckchand*[5] and *Jagabhai Lalubhai* v. *Vijbhukandas Jagjivandas*[10] and the judgment of Subrahmanya Aiyar, J., in *Rangayya Chetti* v. *Thanikachalla Mudali*[4] held that the power referred to in S. 266 of the Code of Civil Procedure was the same as the power referred to in S. 30 of the Insolvency Act. In A.A.O. No. 31 of 1925 Waller and Madhavan Nair, JJ., held following *Rangayya Chetty* v. *Thanikachalla Mudali*[4] that

"the power of the manager to deal with the joint family property vests in the Official Receiver and that he is entitled to sell the joint family property to satisfy the debts of the family."

If the question was *res integra* I should be inclined to hold that under the Provincial Insolvency Act the power of a Hindu father to dispose of his son's shares in the family property for his debts does not vest in the Official Receiver. S. 28 of the Provincial Insolvency Act vests in the Court the whole property of the insolvent on the making of an order of adjudication. This expression "whole of the property of the insolvent" has been construed in *Balavenkata Seetharama Chettiar* v. *The Official Receiver of Tanjore*[3] as to include the power of the father to dispose of the son's share for his debt. In *The Official Assignee of Madras* v. *Allu Ramachandra Aiyar*[7] it was held that where the managing member of a Hindu family consisting of himself and his sons is adjudicated insolvent, the interests of the sons do not vest in the Official Assignee by reason of the adjudication although it would be competent to the latter to deal with their shares, if the debts of the insolvent were of such a nature as to be binding on their interest. In *Subramania Aiyar* v. *Krishna Aiyar*[11] Phillips and Madhavan Nair, JJ., held that the power of a Hindu father over the family property including the son's interests therein must be deemed to be property within S. 28 and as

3. (1926) I.L.R. 49 M. 849: 51 M.L.J. 269 (F.B.).
4. (1895) I.L.R. 19 M. 74.
5. (1883) I.L.R 7 B. 438.
6. (1902) I.L.R. 26 M. 214.
7 (1922) I.L.R. 46 M. 54: 43 M.L.J. 569.
10. (1886) I.L.R. 11 B. 37.
11. A.I.R. 1927 M. 701.

The Official Receiver, Anantapur v. Ramachandrappa.

such vests in the Court of the Receiver. Phillips, J., after referring to S. 52 of the Presidency Towns Insolvency Act, observed:

"If therefore the English Bankruptcy Act and the Presidency Towns Insolvency Act considered this power as the property of the insolvent, there must be very strong reason for holding that the same word 'property' in the Provincial Insolvency Act has a different meaning and excludes such powers. On this ground I think it must be held that the power of the Hindu father over the family property must be deemed to be 'property' within the meaning of the Act and as such vests in the Court of the Receiver."

The definition of the word "property" in section 2 (*d*) is "property includes any property over which or the profits of which any person has a disposing power which he may exercise for his own benefit." In S. 28, the expression is "the property of the insolvent." According to the definition of the term 'property,' unless there be anything repugnant in the subject or context, the word "property" should be understood as defined in section 2 (*d*). With very great respect to the learned Judges who decided *Balavenkata Seetharama Chettiar* v. *The Official Receiver of Tanjore*[3] I am unable to see why the word "property" should not be interpreted as defined in the definition section. Their Lordships of the Privy Council in *Sat Narain* v. *Behari Lal*[2] clearly laid down that in interpreting the Presidency Towns Insolvency Act, the Act and the Act alone must be taken into consideration. If the word "property" as used in section 28 is understood as defined in section 2 (*d*), there would not be much difficulty in disposing of this case; for the term "property" includes any property over which or over the profits of which any person has a disposing power which he may exercise for his own benefit. The expression "own benefit" is derived from the English Bankruptcy Act of 1883. This expression was not found in the Indian Insolvency Act which was in force till the Presidency Towns Insolvency Act was enacted in 1909.

In S. 30 of the Indian Insolvency Act the expression was "which he might lawfully execute for his benefit." In enacting the Provincial Insolvency Act of 1907 and the present Insolvency Act of 1920, the legislature advisedly used the expression "for his own benefit." There must be some object in the legislature advisedly using the expression "own benefit" when it was not found in the Indian Insolvency Act. That expression "own benefit" has been the subject of interpretation in the English Courts.

2 (1924) L.R. 52 I A. 22: I.L.R. 6 Lah. 1: 47 M.L.J. 857 (P.C.).

3. (1926) I.L.R. 49 M. 849: 51 M.L.J. 269 (F.B.).

The Official Receiver, Anantapur v. Ramachandrappa.

In the goods of Jane Turner[12] it was held that the expression "own benefit" meant his sole benefit. Butt, J., observed at p. 19:

"The section of the Bankruptcy Act of 1883 to which I have been referred seems to me to be limited to rights which a bankrupt may exercise for his own benefit, and for his own benefit alone."

In that case the trustee in bankruptcy claimed the right to administer the estate of the insolvent's deceased wife to the administration of which he was entitled. The Court held that the trustee was not entitled to the administration of the estate of the insolvent's deceased wife even though he was entitled to some beneficial interest in the estate. *In re S. S. B.*[13] and *In re Salt*[14] it was held that under section 120 of the Lunacy Act, 1890, the committee in lunacy did not get any power vested in the lunatic for his own benefit. Applying the principle of these cases to the expression "own benefit" as used in section 2 (*d*) we have to see whether the manager of a joint Hindu family can for his own benefit sell the family property. He can sell the family property for his debts which are binding upon the family; he cannot sell the family property for his own debts if they are not binding on the family. When debts are binding on the family, the whole family is bound to pay off the debts; and when the manager sells the property of the family for debts binding on the family, he sells the family property not for his sole benefit but for the benefit of or on behalf of all the members of the family on whom the debt is binding; and therefore when the managing member of a joint Hindu family becomes insolvent, the power to sell the shares of the other members cannot vest in the Official Receiver as it is not a power which is exercisable for the insolvent's own or sole benefit. In *Nunna Brahmayya Setti* v. *Chidaraboyina Venkitasami Sanka Danayya*[6] Bhashyam Aiyangar, J., observed :

"If the question were *res integra* and not covered by the course of judicial decisions bearing upon the corresponding expression occurring in S. 266 of the Civil Procedure Code, I should entertain considerable doubt as to whether the power which under the Hindu Law, a managing member of a joint Hindu family has over the interests and shares of the junior members in the family property, is within the meaning of S. 30 of the Insolvency Act, a power vested in the insolvent, which he can lawfully execute for his benefit."

In some of the later cases, it has been held that the Provincial Insolvency Act of 1907 must be understood in the light of the Indian Insolvency Act and the Provincial Insolvency Act of

6. (1902) I.L.R. 26 M 214.
12. (1886) 12 P.D. 18.
13. (1906) 1 Ch. 712.
14. (1896) 1 Ch. 117.

The Official Receiver, Anantapur v. Ramachandrappa.

1920 should be understood in the light of the Presidency Towns Insolvency Act of 1907. The Provincial Insolvency Act of 1907 made considerable departure from the old Indian Insolvency Act, Statute 11 and 12 Vic., c. 21. The Provincial Insolvency Act of 1920 has departed in several respects from the Presidency Towns Insolvency Act. Though in many respects the Provincial Insolvency Act of 1920 is brought into line with the Presidency Towns Insolvency Act of 1909 yet the legislature advisedly omitted to introduce into the former S. 52 of the latter Act and it is not right for the Courts, I venture to say, to import into it what the legislature advisedly refrained from putting into it. The power of the father "to dispose of the joint family property is not absolute but conditional on his having debts which are liable to be satisfied out of that property"—*Sat Narain* v. *Behari Lal*[2]. If the property is the insolvent's within the meaning of S. 2 (*d*), it vests in the Official Receiver, and, if it is not, it does not vest. In the absence of some section like section 52, there is hardly any warrant for holding that the shares of the sons do not vest in the Official Receiver but the power of the father to dispose of them vests in him. S. 28, clauses (3), (4) and (5), which indicate what and what not is the property of the insolvent makes no reference to his capacity or power in or over property which he could exercise for his own benefit.

The question whether S. 28 vests in the Official Receiver the power of the father to dispose of the son's share for his debt will have to be examined by a fuller Bench when the question arises. I have indicated my view on this point in order to help discussion when the question is again brought up.

Following the decision of Subrahmanya Aiyar, J., in *Rangagiah Chetty* v. *Thanikachalla Mudali*[4] and the decision of the bench of Waller and Madhavan Nair, JJ., in A. A. O. No. 31 of 1925, I answer the question referred to me in the affirmative.

A.S.V. *Question answered in the affirmative.*

---

2. (1924) I.L.R. 6 Lah. 1 at 22: L.R. 52 I.A. 22: 47 M.L.J. 857 (P.C.).
4. (1895) I.L.R. 19 M. 74.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE REILLY.

Paidimarri Mahalakshmamma .. *Appellant** (*Plff.*)

v.

Chaturvedula Suryanarayana and others .. *Respondents* (*Defts.* 1 *to* 7 *and* 9).

Mahalakshmamma *v.* Suryanarayana

Hindu Law—Joint family—Partition—Branches—Partition between—Partition between members of each branch inter se *if effected by—Construction of partition deed—Registered partition deed effecting division by metes and bounds—Re-union between parties to—Unregistered document purporting to effect—Admissibility in evidence—Registration Act, S. 49—Re-union of properties—Re-union of status—No distinction between—Proof of re-union by conduct subsequent to partition deed—Permissibility—Minor—Guardian—Adverse possession against minor—Plea of, in regard to property in guardian's possession as such—Permissibility of.*

Two brothers died, each leaving two sons. A deed of partition was executed among the four sons, and the question arose as to whether the deed effected a fourfold division between the parties to it, thereby effecting a severance between the sons of each brother *inter se*, or whether its effect was merely to effect a division between the two branches, leaving the members of each branch joint as before.

Held, that the deed, on its true construction, effected a fourfold division between the parties to it and that by it the members of each branch became divided *inter se*.

Where a registered deed of partition divided certain properties into shares and gave each sharer an absolute and individual right in the share allotted to him, *held*, that a deed which affected the properties comprised in the registered deed by making what was separate under it joint and which gave a list of the properties which it was intended to affect required registration and was, if not registered, inadmissible in evidence and could not be used to prove that there was a re-union among the sharers.

Parties who became divided by a registered deed of partition can by their conduct show that, subsequent to the said deed, they continued to be joint or re-united. No document is necessary for that purpose.

A person who is either an actual legal guardian or who takes upon himself the guardianship of a minor cannot be heard to say that his possession is adverse to the minor. So long as a person is in charge of a minor's property as guardian he is only an agent or trustee and cannot set up adverse possession.

Per *Reilly, J.*—A change from joint tenancy to tenancy-in-common does not "affect" immoveable property within the meaning of S. 49 of the Registration Act. Accordingly, a division in status can be proved by an unregistered instrument without violating S. 49 of that Act.

Where, by the terms of a registered partition deed, the family property has been divided into specific plots and distributed among the sharers, neither

---

*Appeal No. 307 of 1926. 18th April, 1928.

Mahalakshmamma v. Suryanarayana.

a re-union of the properties nor a re-union of status, which necessarily involves the re-union of the properties, can be proved by an unregistered document.

Appeal against the decree of the Court of the Subordinate Judge of Guntur in O.S. No. 48 of 1924.

T. R. Ramachandra Aiyar, S. Srinivasa Aiyar and *V. Pattabhirama Sastri* for appellant.

Ch. Raghava Rao and *B. T. M. Raghavacharlu* for respondents.

The Court delivered the following

Kumaraswami Sastri, J.

JUDGMENTS. *Kumaraswami Sastri, J.*—This appeal arises out of a suit filed by the plaintiff who is the daughter of one Rama Somayajulu for possession of the properties mentioned in the plaint and for an account from defendants 1 and 9 for the management of suit properties on plaintiff's behalf and for a decree for payment of such sum as may on the taking of the account be found due to the plaintiff. The case of the plaintiff is that her father Rama Somayajulu and the 1st defendant's father, Narasimha Somayajulu were brothers, that they became divided by a registered deed of partition in 1902, that since then the properties which fell to the share of Rama Somayajulu were in Rama Somayajulu's possession and on his death were taken possession of and managed by the 1st defendant on behalf of the plaintiff and her mother and that the plaintiff is entitled to the property. She also states that the defendant refused to hand over, though demanded, the properties said to have fallen to the share of Rama Somayajulu in partition (items 1 to 5) and properties purchased subsequent to the partition in name of Appayya, Rama Somayajulu's father-in-law, which are items 7 to 10. As regards items 7 to 10, the case of the plaintiff was that Appayya transferred the properties to her father and that she is entitled to the property.

The case of the contesting defendant is that although there was a deed of partition in 1902, such deed was never intended to be acted upon so far as the brothers were concerned, but the object was to separate Pattabhiramayya and Gopalakrishnayya, cousins of Rama Somayajulu and Narasimha Somayajulu, and when that was done Narasimha Somayajulu and Rama Somayajulu remained joint and undivided. The intention of Rama Somayajulu and Narasimha Somayajulu was not to divide the properties and become separate *inter se*. Even if the document could be construed to indicate that intention there must be deemed to have been a re-union as they never divided their properties

Mahalakshmamma v. Suryanarayana.

Kumaraswami Sastri, J.

as contemplated in the document and continued to be members of an undivided family. There were joint leases and joint dealings and after the death of Rama Somayajulu his widow and his daughter lived with Narasimha Somayajulu and were maintained and supported by him, and Narasimha Somayajulu bore the marriage expenses of the plaintiff. It is also urged that the claim is barred by limitation as plaintiff attained majority more than three years before the filing of the suit.

The Subordinate Judge was of opinion that Narasimha Somayajulu and Rama Somayajulu were members of a joint family. According to his view there was no partition *inter se* between Rama Somayajulu and Narasimha Somayajulu. He also believes that subsequent to the partition there was re-union. Exhibit XV, the memorandum of re-union, alleged on the side of the defendant to have been executed by Rama Somayajulu and Narasimha Somayajulu and said to be a forgery by the plaintiff is accepted by the Subordinate Judge as genuine. He also deals with the conduct of the parties as evidenced by correspondence and other documents and comes to the conclusion that the brothers were undivided. As regards items 7 to 10, he gives a decree for the plaintiff on the ground that they were the self-acquisitions of Rama Somayajulu and not the joint properties of the two brothers. The plaintiff appeals against the decree of the Subordinate Judge for possession of items 1 to 6 and the 1st defendant files a memorandum of objections as regards items 7 to 10.

The main question in this appeal is whether Narasimha Somayajulu and Rama Somayajulu continued after the death of Rama Somayajulu to be members of an undivided family and whether items 7 to 10 are the self-acquisitions of Rama Somayajulu. The facts shortly are these : There were three brothers, Rama Jogi, Suryanarayana and Adinarayana. Rama Jogi had two sons, Pattabhiramayya, who is examined in this case as P.W. 1 and Gopalakrishnayya, who died about 1902 leaving a son Sivaramakrishnayya, who is examined as plaintiff's 4th witness. Suryanarayana died leaving a widow Kantamma and two sons, Rama Somayajulu and Narasimha Somayajulu. The 9th defendant is the widow of Narasimha Somayajulu. The 1st defendant is the son of Narasimha Somayajulu. Narasimha Somayajulu died about 8 or 9 years before the date of the suit and Rama Somayajulu died in 1904 leaving his widow who is the mother of the plaintiff. The widow died in 1910. Mahalakshmamma was an infant when Rama Somayajulu died and the date of her birth is not seriously disputed. It is given as

Mahalakshmamma v. Suryanarayana.

Kumaraswami Sastri, J.

April, 1902. It is not disputed that there were disputes in the family between Rama Jogi's branch and Suryanarayana's branch and there was an award by the mediators, Exhibit XXV which is dated 25th February, 1899. This is an award which purports to have been made by two arbitrators and it sets out the relationship of the parties. It states that they gave them a kararnama on 6th December, 1896, reciting therein that all the ancestral properties consisting of moveables and immoveables and specified in the schedules thereto attached which were divided a long time ago but were held as joint till then should be partitioned and given into four shares. The award divides the property into four shares and specifies the share that each of the parties should take. Pattabhiramayya evidently was not satisfied with this award and he was raising objections on the score that the partition was not equal. In settlement of all disputes there was a partition deed executed among the four parties, Exhibit A, in the suit on 6th July, 1902. This deed of partition, so far as its terms are concerned, purports undoubtedly to be a partition of the property into four shares, each of the sharers taking a definite specified portion of the properties. Plans were attached to this deed which also show the specified portions which fell under the document to the share of each. The document closes as follows:—

"As we have settled that each sharer should himself take the palmyra trees standing in his share, we shall cut within one year the babul trees standing on the inam lands of Nothakki village and take them in equal shares. We four shall take the fruit and branches in equal shares without allowing them to be trampled upon by the field cattle. Narasimha Somayajulu should cut, within one year, the ravi tree standing on Pattabhiramayya's land. Each sharer among us shall enjoy his respective share hereditarily with absolute right. In so enjoying, no one of us or his heirs shall at any time raise any sort of disputes against the other. Each of us shall not dispute the other saying that there is excess or deficit in his share or that there is still some property yet to be divided. This deed of partition is executed with the consent of all of us."

This deed is signed by four persons. If this document had stood alone, there can be little doubt that it effects a complete severance of interest not only between Pattabhiramayya and Gopalakrishnayya but among all the four executants, namely, Pattabhiramayya, Gopalakrishnayya, Narasimha Somayajulu and Rama Somayajulu. The main argument for the defendants is that at the time of Exhibit A there was no dispute between Narasimha Somayajulu and Rama Somayajulu *inter se* and that although Exhibit XXV purports to be a division of four shares, really if the latter portion of the document is considered, namely,

Mahalakshmamma v. Suryanarayana.

Kumaraswami Sastri, J.

the portion referring to Narasimha Somayajulu and Rama Somayajulu as one party and Pattabhiramayya and Gopalakrishnayya as the other and separate parties for the purpose of adjustment towards the value of some trees, it does not show any partition *inter se*. There is some force in this argument because the schedules as regards particulars do really treat Rama Somayajulu and Narasimha Somayajulu as members of one family in the adjustment of account. But Exhibit A which was executed two years afterwards does not keep up this method of adjustment, but as I have said before treats them as separately entitled.

There is, however, evidence to show that between the dates of Exhibits XXV and A, Narasimha Somayajulu and Rama Somayajulu continued to be members of one family and did not divide *inter se*. No doubt, correspondences and lease deeds have been put in; but I do not think they are of much value in the face of a specific statement in Exhibit A as to the partition. What we have to see is, what was the conduct of the parties after the date of Exhibit A? As regards the question of division between Narasimha Somayajulu and Rama Somayajulu, Exhibit XV, an unregistered memorandum, is put in by the defendant to show that there was really no partition between the two brothers. The genuineness of Exhibit XV is not admitted by the plaintiff. An objection is taken that even if it is genuine it requires registration. Ex. XV runs as follows:

"Samshrusti Jabita (common list), dated the 6th July, 1902, jointly executed by (1) Chathurvedula Narasimha Somayajulu and (2) Rama Somayajulu, sons of Suryanarayana Garu, Brahmins, Inamdars, etc., residing in the village of Noothakki of Guntur Taluk.

When for effecting a partition of our ancestral lands between ourselves and our senior paternal uncle's sons, Pattabhiramayya and Gopalakrishnayya, the said lands were divided into two sections, the said Pattabhiramayya Garu having stated that such allotment could not be made and equally adjusted, and that he was entitled to get a fourth share in the whole, and that, therefore, the division should be made into four shares, so that each might get one share, and having further suggested that if we were to continue joint, we could again subsequently combine (the shares) and having thus created a complication we consented and settled the matters and entered into a partition deed with them this day. As the lands which have fallen to our half share under the said partition deed though not given any marks, have been shown in the plan as having come to us in two lots, as we two have not become divided as between ourselves, we have entered into a samshrusti as detailed hereinbelow.

So we shall as usual be exchanging pattas and muchilikas in respect of our half share, as one member. Though we own other properties, move-

Mahalakshmamma v. Suryanarayana.

Kumaraswami Sastri, J.

able, immoveable, etc., yet as we have not yet entertained any intention to partition, samshrusti is (hereby) effected."

It then gives the schedule of the properties referred to in the partition deed. It gives the house, inams, the lands which according to the partition deed fell to the share of these two brothers. This document is dated 6th July, 1902, the same date of Exhibit A.

[The learned Judge then discusses the evidence with regard to Ex. XV and concludes]

I do not think that the Subordinate Judge was right in holding that the evidence as regards Exhibit XV shows that it is a genuine document. It is sufficient for the purpose of this case. to show that it has not been proved. Having regard to the various facts, it requires strict proof of Rama Somayajulu's signature before I can accept it as a genuine document. Even if it is genuine, I think it requires registration. It is admitted Exhibits A and XV really form one transaction. One was intended to be an antidote to the other. Exhibit A in terms divides the property into four shares and gives each man an absolute and individual right. Exhibit XV affects the property comprised in Exhibit A inasmuch as it makes what was separate property joint property and, what is more, Exhibit XV gives a list of the properties which it is intended to affect. It cannot be said that Exhibit XV does not affect immoveable properties in terms. Exhibit XV, therefore, requires registration. In order to vary the terms of a contract reduced to writing under section 92 we must have another instrument in writing, and if that instrument affects immoveable property it has to be registered. I do not think, therefore, that Exhibit XV can be used to prove that there was reunion. But this does not, however, settle the matter. It can be shown by the conduct of the parties that, subsequent to Exhibit A, they did not divide their properties which they had already got in common and continued to treat the properties as joint properties. Just as no document is required to prove a division in status and as no document is also required where the partition between the parties is oral, the law merely saying that if it is in writing and affects immoveable property it should be registered, no document is necessary for a man throwing his property or earnings into the joint stock and the members of the family treating separate properties as joint properties so that in the absence of any facts attracting the provisions of the Registration Act one can prove that the parties continued to be joint or re-united by showing their conduct.

Mahalakshmamma v. Suryanarayana. Kumaraswami Sastri, J.

There are several circumstances which show that, subsequent to the deed of partition, Narasimha Somayajulu and Rama Somayajulu dealt with the properties and treated each other as members of a joint family.

[The learned Judge then discusses the evidence with regard to the re-union and concludes]

It seems to me that the cumulative effect of all these, in the absence of any evidence to show that the parties dealt with any of the properties which fell to them in partition as separate property, that he either had leased or borrowed money on it or created a mortgage on charge is clearly that at the date of Rama Somayajulu's death the brothers had become re-united and that their intention was to live as members of one family. It is argued that the conduct of the widow who had only a life-interest in the property in having allowed 1st defendant to be in possession of the property for a long time would not prejudice the daughter's claim. The question is not whether the conduct of the widow in any sense prevents the daughter from putting forward her claim. But the question is whether such conduct of the widow does not probablise the case of the defendants whether the brothers remained joint or not at the time of Rama Somayajulu's death. It may be said that the widow was ignorant of the rights, but then there is the fact that there was her father Appayya, presumably a man of business, as he was managing the lands of the brothers, and it is not suggested that he did not know the real state of affairs, that he did not know of the partition deed and that he did not know that the brothers were divided, if as a matter of fact they were. When we find that not only before the death of Rama Somayajulu but afterwards things went on as usual he should have known that they were members of a joint family. If after the death of Rama Somayajulu with the knowledge and willingness of her father and other male relations she claimed only maintenance and never asserted a right to these lands which according to the partition fell to the share of her husband, I think the inference is irresistible that the brothers, whatever may be the reason, did not want to live as members of a divided family and, as if the partition never took place, continued to treat themselves as joint. Unfortunately, both Narasimha Somayajulu and Rama Somayajulu are dead. The 1st defendant is a young man about the same age as the plaintiff and it is impossible for us to get an explanation of the letters and we have to make the best of the letters taking into consideration the circumstances and the langu-

Mahalakshmamma v. Suryanarayana.

Kumaraswami Sastri, J.

age of the letters. In a case like this, we have to see whether the transaction subsequent to Exhibit A support the case that the parties, for some reason or other, became members of a joint family and dealt with the properties as such. Taking all these facts and having regard to the fact that there is not a single document excepting Exhibit A to show that they treated the properties as separate I think that the whole subsequent conduct of the parties supports the finding of the Subordinate Judge.

As regards the question of limitation I think there is no question of limitation at all in this case. It is admitted that both the widow and her daughter lived with Narasimha Somayajulu and that they were under his protection. Adverse possession would not avail so far as the daughter is concerned, because she does not claim through the widow. The widow has only a widow's interest in the matter and adverse possession can only be of a limited interest, and Narasimha Somayajulu could not have prescribed for anything more than a limited interest, even assuming it was adverse in her life-time. On her death the rights of the daughter began. The daughter was a minor and she continued to remain as minor till about three years before the suit. Till 1912 she was unmarried and was under the protection of Narasimha Somayajulu. I do not think it is open to a person who takes charge of a minor and protects her to plead that as regards her properties he has adverse possession. The law is clear that a person who is either an actual legal guardian or who takes upon himself the guardianship of a minor cannot be heard to say that his possession must be taken to be adverse to the minor. If any authority is needed, I may refer to *Vasudeo Atmaram Joshi* v. *Eknath Balkrishna Thite*,[1] where the mistress of a person after his death was protecting his minor sons and managing the property and claimed adverse possession, it was held that so long as she acted as guardian or agent she could not do so. It follows that so long as a person is in charge of a minor's property as guardian that person is only an agent or trustee and cannot set up adverse possession. I may refer in this connection to *Howard* v. *Earl of Shrewsbury*.[2] Reliance is placed by Mr. Raghava Rao on *Seetaramaraju* v. *Subbaraju*.[3] But that case does not help him in any way, because all that case lays down is that in respect of adverse possession, though time begins to run against a lunatic, an extended period of limitation is given and he will be entitled

1. (1910) I.L.R. 35 B 79
2 (1874) 17 Eq. 378.
3. (1921) I.L.R. 45 M. 361: 42 M.L.J. 262.

to file a suit within 3 years after he becomes sane. It that case there was no question of guardianship between the parties. I think the Subordinate Judge was right in holding that there was no limitation so far as plaintiff was concerned. I have come to the conclusion that so far as items 1 to 6 are concerned the plaintiff will not be entitled to the separate property of her father Rama Somayajulu.

As regards items 7 to 10 I do not think there is sufficient ground to disturb the finding of the Subordinate Judge that the property was bought by Rama Somayajulu.

[The learned Judge then discusses the evidence on the point and concludes]

So far as items 7 to 10 are concerned I do not want to disturb the finding of the Subordinate Judge.

The whole trouble has arisen from Rama Somayajulu and Narasimha Somayajulu executing a partition deed and immediately not giving effect to it.

In the result the appeal fails and is dismissed. But considering the conduct of the defendant in putting forward Exhibit XV and the two post cards, which I do not think are genuine, and also the plea of adverse possession as against plaintiff who was under his father's protection and who was bound to protect her during her minority, I think the proper order will be to make the 1st deft. pay the institution fee due to Government both in this Court and in the Court below and make him also pay proportionate costs as regards items 7 to 10 both here and in the Lower Court. Other costs will be borne by each party as regards the appeal.

The memorandum of objections is dismissed with costs.

Reilly, J.

Reilly, J.—I agree that Exhibit A must be taken as having effected a fourfold partition between the parties to it and that the effect of it cannot be whittled down by the award, Ex. XXV, or by anything else which happened before the date of Ex. A. I think, therefore, we must start in this case with the fact that there was a partition between the four parties under Exhibit A in July, 1902. The question is whether there was after that a re-union between the plaintiff's father, Rama Somayajulu and the defendant's father, Narasimha Somayajulu. As Mr. Ramachandra Aiyar has urged, re-union is a rare thing, and we ought not lightly to accept a story of re-union following a definite partition effected by a registered document in that way. But in connection with this I think it is proper that we should remember that the parties to Exhibit A were not co-parceners in an undivided

Mahalakshmamma v. Suryanarayana.

Reilly, J.

family at the date of Exhibit A. The evidence of P.W. 1, Pattabhiramayya, one of the parties to that partition, shows that there has been an earlier division between him and his brother on the one side and their cousins, Narasimha Somayajulu and Rama Somayajulu on the other. He says that after the death of his uncle Adinarayana, Adinarayana's widow in 1888 filed a suit for maintenance, and on that happening the family was divided in that way; there was a division of moveables and since that time Suryanarayana's sons, the brothers Narasimha Somayajulu and Rama Somayajulu on the one side lived jointly and separately from Pattabhiramayya and his brother Gopalakrishnayya on the other. He also says in another part of his evidence that they became divided like that 5 or 6 years after his father's death, which appears to have occurred about 50 years before he gave evidence in 1925. The evidence is that the partition deed, Exhibit A, was executed not for the convenience of Rama Somayajulu and Narasimha Somayajulu in any way, but to suit the convenience of Pattabhiramayya and his brother Gopalakrishnayya. And it appears that Rama Somayajulu and Narasimha Somayajulu had no particular reason for becoming divided at that time. In the circumstances we start with no inherent improbability in the story that Narasimha Somayajulu and Rama Somayajulu immediately after the execution of Ex. A decided that they would re-unite and live as members of an undivided family.

[The learned Judge discusses the evidence with regard to the alleged re-union and proceeds]

Then there is Exhibit XV, an unregistered document, which has been put forward to show that on the very date of Ex. A the two brothers, Rama Somayajulu and Narasimha Somayajulu, effected a re-union. I agree that, so far as that document affects immoveable property—and it obviously affects such property—it is inadmissible in evidence because it is unregistered. That does not, however, meet Mr. Raghava Rao's argument that it can be used to show that there was a re-union in status between Narasimha Somayajulu and Rama Somayajulu. Mr. Raghava Rao argues that the opinion has been expressed in several cases that an unregistered partition deed, which purports to divide the property of a Hindu family into separate plots, though it cannot be used to prove the division of the property, can be used to prove a division in status. And he argues from that that in the same way an unregistered re-union deed can be used to prove a re-union in status. I think in the latter part of this argument there is a

Mahalakshmamma v. Suryanarayana. — Reilly, J.

fallacy, and I will try to explain exactly where to my mind the fallacy lies. The most authoritative example in recent years of the principle on which the opinion that an unregistered partition deed, which cannot be used to prove a division of property, can yet be used to prove a division in status rests is the ruling of their Lordships of the Privy Council in *Varada Pillai* v. *Jeevarathnammal*,[4] though that case did not deal with a partition deed. If we examine that ruling, we find in it nothing to affect the ordinarily accepted interpretation of the prohibition in the Registration Act under which an unregistered document purporting to create, declare or limit any interest in immoveable property of the value of Rs. 100 or more cannot be used to prove that transaction. The effect of the ruling of the Privy Council in *Varada Pillai's case*[4] is that, while such a document cannot be used to prove such a transaction, it can be used to prove a different fact relating to the property even though that fact is ultimately connected with the transaction.

In *Varada Pillai's case*[4] an unregistered document was produced to prove a gift of land. Their Lordships did not admit it to prove the gift; but they admitted it for the purpose of showing that the alleged donee's possession of the land had been adverse to the alleged donor from the date of the document and not on behalf of the donor. That was a different fact from the alleged gift, a distinct fact, a fact capable of being dissociated from it, which did not necessarily involve or imply the gift. The result of that ruling is that an unregistered document, which we are prohibited by the Registration Act from using to prove the transaction embodied in it, may be used to prove some different fact relating to the property and connected with the transaction so long as it is a distinct fact, a fact capable of dissociation from the one which the Registration Act forbids us to prove by the document, a fact not necessarily implying or involving that forbidden fact. That ruling shows the lengths to which we may go in proving by an unregistered document facts connected with a transaction in respect of immoveable property without transgressing the provisions of the Registration Act. But *Varada Pillai's case*[4] is certainly not an authority on the strength of which we can use an unregistered document to prove indirectly the very fact which the Registration Act forbids us to prove by it.

For instance, if the Registration Act forbids us to use an unregistered document to prove fact A re-

4. (1919) L.R. 46 I.A. 285: I.L.R. 43 M. 244: 38 M.L.J. 313 (P.C.).

Mahalakshmamma v. Suryanarayana. —— Reilly, J.

corded in it, we can use the document to prove fact B, provided that fact B is really distinct from fact A, capable of dissociation from it and does not necessarily involve or imply fact A; but, if fact A necessarily follows from fact B and is implied in it, then we cannot use the unregistered document to prove fact B and so indirectly to prove fact A, as thereby we should be contravening the provisions of the Registration Act. Let us apply this to an unregistered partition deed purporting to divide the property of a family specifically into separate plots and distribute them among the members. It is admitted that the partition deed cannot be used to prove the division of the property. But the opinion has been expressed —and I venture to think rightly—that it can be used to prove a division in status, which we can dissociate from, and which does not necessarily imply, a division of property. It is true that a division in status must carry with it either a change from joint tenancy to tenancy-in-common or a change from joint tenancy to separate ownership of specific property. But, as we have proved a division in status, we have not necessarily proved any division of the property into specific plots; the change in ownership may not have gone beyond tenancy-in-common, or it may have gone further to the stage of actual division of the property; whether the second stage had been reached remains unknown. It may perhaps be said that even if there be a mere change from joint tenancy to tenancy-in-common, that change affects immoveable property. But I think, if we consider the matter, it is quite clear that that change does not "affect" immoveable property within the meaning of section 49 of the Registration Act as we must now interpret it. It had been finally decided by their Lordships of the Privy Council in *Girja Bai's case*[5] and in *Suraj Narain's case*[6] that a division in status may be effected and proved by something very much less than a registered document. If the change effected by a division in status, the change from joint tenancy to tenancy-in-common, was a change "affecting" immoveable property within the meaning of section 49 of the Registration Act, the decision in *Girja Bai's case*[5] would have been impossible. I, therefore, think it is clear that, when we say that a division in status necessarily affects property, because what was originally held in joint tenancy has become property held by tenants-in-common, that is not a change "affecting" immoveable property within the

5. (1916) L.R. 43 I.A. 151: I.L.R. 43 C 1031: 31 M.L.J. 455 (P.C).
6. (1917) L.R. 44 I.A. 201: I.L.R. 40 A. 159: 33 M.L.J. 180 (P.C.).

Mahalakshmamma v. Suryanarayana — Reilly, J.

meaning of section 49 of the Registration Act, and, therefore, a division in status can be proved by an unregistered document without violating section 49 of the Registration Act.

But can we on the same principle, as Mr. Raghava Rao suggests, use an unregistered document, to prove a re-union in status in a case like this, where by the terms of a registered, partition deed the family property has been divided into specific plots and distributed among the members? It is admitted that we cannot use an unregistered re-union deed to prove a re-union of the property; but it is suggested that we can use it to prove a re-union in status. But, suppose it is used to prove a re-union in status, can we stop there? The very moment we have proved the re-union in status we have *ipso facto* proved the change in the property, the amalgamation of the separate ownership into joint ownership. We cannot dissociate the two things; the one involves the other. If, therefore, we have proved a re-union in status, *ipso facto* we have proved a re-union of property, a fact which the Registration Act forbids us to prove by an unregistered document. To my mind it is clear that we may prove a division in status by an unregistered partition deed, but we cannot prove by an unregistered document following a registered partition deed, which had divided the property into specific plots, either a re-union of the property or a re-union of status, which necessarily involves the re-union of the property.

I agree that there is considerable doubt whether Ex. XV is a genuine document. But, even if it were a genuine document, I should have no doubt that it could not be used, being unregistered, to prove the re-union of status, which necessarily involves re-union of property.

Mr. Raghava Rao has suggested a further use to which Exhibit XV could be put, namely, to prove that the parties had at the time of its execution the idea of re-union in their minds. Technically I think the document is admissible for the purpose. But in my opinion it would be of very little avail in that way to Mr. Raghava Rao's client in the present case.

I agree however that, leaving Exhibit XV out of consideration altogether, there is sufficient evidence in the circumstances of the case to show that there must have been a re-union between Narasimha Somayajulu and Rama Somayajulu after the date of Exhibit A.

On the other points of the case I agree that the plaintiff's claim cannot be held barred by limitation. Adverse possession against Subbamma would not have effect against the plaintiff;

Mahalakshmamma v. Suryanarayana. Reilly, J.

and limitation could not have begun to run against the plaintiff while she was a minor in the *de facto* guardianship of her father's brother.

I agree also it is not shown with sufficient clearness that Narasimha Somayajulu contributed to the purchase money for items 7 to 10 to make it necessary for us to interfere with the finding of the learned Subordinate Judge on that point.

I agree, therefore, that both the appeals and the memorandum of objections must be dismissed and that the costs should be borne in the manner proposed by my learned brother.

A.S.V. *Appeal and cross-objections dismissed.*

PRIVY COUNCIL.

[On appeal from the Court of the Judicial Commissioner of the North-West Frontier Province.]

PRESENT:—LORD SHAW, LORD SALVESEN AND SIR JOHN WALLIS.

Musammat Vaishno Ditti .. *Appellant** (*Plff.*)

v.

Musammat Rameshri and others .. *Respondents* (*Defts.*).

P. C. Musammat Vaishno Ditti v. Musammat Rameshri.

North-West Frontier Province Regulation VII of 1901, *section* 27 (*a*) —*Object of—Custom—Plea of—Court's duty in case of—Evidence*—Riwaj-i-am—*Nature and evidentiary value of—Manuals of customary law issued by Government for each district—Evidentiary value of—Evidence adduced by custom in accordance with custom applicable to community of party according to manual of customary law of district—Sufficiency of, if not rebutted—Instances—Absence of—Effect—Daughter's daughter—Representation of, to mother predeceasing her father—Right of—Custom of—Right to share which had devolved on mother if follows from—Civil Procedure Code* (*V of* 1908), *O* 32, *Rr* 4, 7—*Compromise affecting minor sanctioned by Court—Setting aside, on ground of guardian* ad litem *being one whose interest was adverse to that of minor—Hindu Law—Daughters—Inheritance of father—Compromise enlarging their estates in—Validity of, against next male reversioners—Arrangement between them for enjoyment of estate until death of survivor—Validity of.*

In putting, in S. 27 of the North-West Frontier Province Regulation VII of 1901, custom in the forefront, as the rule of succession, whilst leaving the particular custom to be established as it necessarily must be, the Legislature intended to recognise the fact that in this part of India inheritance and the other matters mentioned in the section are largely regulated by a variety of customs which depart from the ordinary rules of Hindu and Mahomedan Law.

Where, therefore, a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom; and

---

*P.C. Appeal No. 84 of 1927. 20th July, 1928.

P. C.

Musammat Vaishno Ditti v. Musammat Rameshri.

the Local Government has come to their assistance by establishing a *riwaj-i-am* or record of custom in the different parts of the Punjab, including the North-West Frontier Province which was formerly included in it

The *riwaj-i-am* is a public record prepared by a public officer in discharge of his duties and under Government rules; it is clearly admissible in evidence to prove the facts entered thereon subject to be rebutted; and the statements therein may be accepted even if unsupported by instances.

Further, manuals of customary law in accordance with *riwaj-i-am*, which have been issued by authority for each district, stand on much the same footing as the *riwaj-i-am* itself as evidence of custom.

Even though, therefore, there be no evidence of instances, still, if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the manual of the customary law of the district, there is sufficient *prima facie* evidence of the existence of the custom, subject, of course, to rebuttal, and it ought not to be held to be insufficient merely for want of instances.

Where the customary law of the district stated that, in the event of a daughter dying *vita patris*, her daughter was entitled to succeed by representation, *held*, that it followed *a fortiori* that a daughter's daughter must be entitled to the share which had devolved upon her mother.

Quaere: Whether, in a case in which the terms of a compromise were approved by the next friend of the minor plaintiff and the guardian *ad litem* of the minor 4th defendant, who were in the same interests as the 5th and 6th defendants, and were further carefully considered and approved by the Court, the compromise would be held to be invalid, as regards the 5th and 6th defendants, on the ground that the person who was appointed their guardian *ad litem* and who represented them in the compromise, was one whose interest was adverse to theirs.

Semble: Under the ordinary Hindu Law, daughters have no power by means of a compromise to enlarge their estates, so as to prejudice the rights of the next male reversioners to succeed to the whole of the father's estate on the death of the last surviving daughter; but they can provide for the enjoyment of the estate until the death of the last survivor.

Appeal No. 84 of 1927 from a Judgment and decree, dated the 26th August, 1925, of the Court of the Judicial Commissioner, North-West Frontier Province, Peshawar (Lieut.-Colonel J. Frizelle), reversing a judgment and decree, dated the 10th June, 1924, of the Court of the District Judge, Peshawar.

The material facts of the case are given in their Lordships' judgment.

Dunne, K. C. and *Nissim* for appellant.

De Gruyther, K. C. and *Parikh* for respondents.

20th July, 1928. Their Lordships' judgment was delivered by

Sir John Wallis.

SIR JOHN WALLIS.—Lala Balmokand, an Arora Sikh who carried on a money-lending business in the town of Peshawar, died in December, 1906, leaving a widow, Musammat Kauran. and four daughters, Nikko, Ramo, Rameshri, Lalo, and Ravelo

P. C.

Musammat Vaishno Ditti *v.* Musammat Rameshri.

Sir John Wallis.

who was a posthumous child. His widow, Kauran, took possession of and managed his estate. At her death, which occurred on the 28th October, 1909, she left a will, dated the 27th January, and a codicil, dated the 23rd May of that year, by which, after founding certain charities, she divided the estate among her daughters in equal shares, and directed that if any of her daughters should die, leaving children before the partition of the property, her surviving children should be competent to receive their mother's share.

On the 12th April, 1910, Rameshri, one of the minor daughters, instituted a suit by her next friend against the executors of her mother's will and her sisters in which she denied that her mother had any power to make a will, and alleged that her eldest sister Nikko, the 3rd defendant, who had been married during her father's lifetime, had no right to succeed to his estate either by law or by the dharmashastra.

In paragraph 7 of the plaint she stated that Surjan Singh, the husband of her minor sister Ramo, the 4th defendant, had been made her guardian *ad litem* and that their grandmother Musammat Hukki had been made the guardian *ad litem* of her minor sisters Lalo and Ravelo, the 5th and 6th defendants.

As regards the written statements of the 1st and 2nd defendants who were sued as executors of Kauran's will, it is only necessary to say that the 2nd defendant Tara Chand, who was the brother of Lala Balmokand and his nearest male agnate, disclaimed any interest in the suit and prayed that his name should be struck out.

The written statement of Ramo, the 4th defendant, denied that her mother Kauran had any power to make a will and prayed that she should be joined as a co-plaintiff with her sister Rameshri.

Nikko, the 3rd and contesting defendant, alleged in her written statement that her mother Kauran was the sole heir of her deceased father according to the dharmashastra, and that according to the same law the rights of the daughters arose only on her death. She alleged that her mother had full powers of disposition over the moveable and self-acquired immoveable property she had inherited, and, further, that the plaintiff had no right of inheritance superior to those of herself and her sisters "both under the law and local custom which binds the parties," and that she herself did not lose her share under the dharmashastra merely because she had been married in the lifetime of

P. C.

Musammat Vaishno Ditti v. Musammat Rameshri.

Sir John Wallis.

her father. She also alleged that the plaintiff herself was married at the date of their mother's death when the succession opened.

In paragraph 7 she alleged that the appointment of Musammat Hukki, the grandmother of the 5th and 6th defendants, as their guardian *ad litem* was defective as she was an old lady and unable to protect their interests, and prayed that she herself should be appointed as their guardian *ad litem*, as they were living with her and under her care as provided in her mother's will.

No written statement was filed by Musammat Hukki on behalf of the minor 5th and 6th defendants who were *ex parte*.

Issues were settled on the 31st May, 1910, and on the 21st June, 1910, the District Judge appointed "guardians *ad litem*" for all the minors, including the plaintiff. In his order he stated that the grandmother Musammat Hukki had refused to act as guardian *ad litem* for the minor 5th and 6th defendants, and had suggested that their sister Nikko, the 3rd defendant, should be appointed as they were living with her. He also stated that Nikko herself had applied to be appointed, but observed that that would only delay the case unnecessarily and that, as she had appointed her husband, Gurmukh Singh, to appear for her and he was willing to appear for defendants 5 and 6, there seemed no objection why he should not be appointed guardian *ad litem* for defendants 5 and 6, and he was accordingly appointed. At the same time, Surjan Singh, the 4th defendant's husband, was appointed as her guardian *ad litem*, and the plaintiff's father-in-law, Ganga Singh, guardian *ad litem* (it should have been next friend) for the minor plaintiff.

Unfortunately, in making this appointment of Nikko's husband and agent, Gurmukh Singh, as guardian *ad litem* of the 5th and 6th defendants—to which no one raised any objection—the District Judge overlooked the fact that the interest of the minor 5th and 6th defendants was adverse to that of their sister Nikko, the 3rd defendant, as one of the issues in the case was whether Nikko was disentitled to share with her sisters in the inheritance by reason of her marriage during her father's lifetime. To this extent their interests in the *lis* between the minor plaintiff Rameshri and the 3rd defendant Nikko were identical with the plaintiff's, with the result that Gurmukh Singh was in the same position as if he had been representing at the same time the plaintiff and the defendant in the suit, and his interest as husband agent of Nikko, the 3rd defendant, was

P. C.
Musammat Vaishno Ditti
v.
Musammat Rameshri.
Sir John Wallis.

adverse to the interest of the minor 5th and 6th defendants, whose guardian *ad litem* he was.

These appointments having been made, Ganga Singh, as the plaintiff's next friend, Gurmukh Singh, as agent of his wife, the 3rd defendant, and guardian *ad litem* of defendants 4 and 5, and Surjan Singh, as guardian *ad litem* of his minor wife, the 4th defendant, proceeded on the same day to file a petition of compromise, which had, no doubt, been previously arranged. This compromise declared that Kauran's will was invalid but maintained the charities which she had founded, divided the rest of the estate between the five sisters in equal shares, and provided that in case of the demise of any of the minor girls before marriage her property should be equally divided among her surviving sisters.

In his order sanctioning the compromise the District Judge, after reciting that the compromise which had been entered into by the guardians and next friends of the various parties, who had also been represented by counsel in all cases, had been most carefully considered by him, and with the additional conditions agreed to by the parties as to defendants 5 and 6, appeared to him to be in the best interests of the minors, and to safeguard the family and the family property, which was considerable, from ruinous litigation, he proceeded to ratify the compromise as amended and passed a decree in accordance therewith.

In accordance with the terms of the compromise, Nikko's husband, Gurmukh Singh, and Rameshri's father-in-law, Ganga Singh, were to be appointed joint guardians of the property of the minor defendants 5 and 6, and, together with Ramo's husband, Surjan Singh, they were to be given a succession certificate to enable them to get in Balmokand's estate.

Unfortunately, Nikko's husband, Gurmukh Singh, died within the year, so that Ganga Singh was appointed the sole guardian of the minor defendants 5 and 6, and also obtained the succession certificate in his name alone, in view of the fact that Ramo had also died and her husband, Surjan Singh, had ceased to have any interest in the estate.

Nikko herself then died late in 1911, leaving a daughter, Vaishno Ditti, the present plaintiff.

Ganga Singh and, after his death in 1916, his sons, Kirpal Singh and Manmohan Singh, who succeeded him as guardians of the minors 5 and 6, and in the management of the estate excluded Nikko's daughter, Vaishno Ditti, the plaintiff in this

P. C.

Musammat Vaishno Ditti v. Musammat Rameshri.

Sir John Wallis.

suit, from all shares in the estate, and divided the income equally between the three surviving sisters, Rameshri, Lalo and Ravelo.

In April, 1923, Vaishno Ditti, by her father-in-law, as her next friend, filed a suit for a declaration of her right to her mother Nikko's share in the estate, but it was held that she was not entitled to sue for declaratory relief, and the plaint was returned to her. She then, on the 26th November, 1923, filed the present amended plaint against her mother's three sisters, Rameshri, Lalo and Ravelo, and against Kirpal Singh and Manmohan Singh, the sons of Ganga Singh, who, as already stated, had succeeded their father in the management of the estate, to recover her mother Nikko's one-fourth share in the property left by Lala Balmokand and his widow Kauran. After reciting the previous litigation and the compromise, the plaint alleged that under the deed of compromise the rights of the parties to the suit were completely determined, and also alleged in paragraph 12 that Musammat Nikko, after the death of her sister, Ramo, was, according to the terms of the deed of compromise and riwaj (custom), owner of one-fourth share of the estate of L. Balmokand, and that after Nikko's death the plaintiff, as her daughter, was entitled to a one-fourth share.

The written statement admitted that a compromise of the previous suit had been effected, and a decree passed in accordance therewith, and did not contain any allegation that the compromise was not binding because some of the minor parties had not been properly represented. Paragraphs (5) and (9) were as follows:

(5) The allegations in para. 7 of the plaint, as made, are not admitted to be correct. The legal effect of the compromise is only this. that the wills of Musammat Kauran were cancelled and the daughters of L Balmokand came into possession of property as daughters with life-interest, according to the *dharmashastra*. No partition was effected amongst them. However, in the deed of compromise, some feasible arrangements were suggested for the sake of convenience and good management of the property. It is wrong to say that on its basis any definite decision was arrived at regarding the rights of the parties, or that the daughters of L. Balmokand or their children became bound to reserve property of the value of Rs. 42,000 permanently for charities. It is correct that according to *dharmashastra*, the share of a daughter who dies unmarried devolves on other daughters, and this is what the deed of compromise implies.

(9)-(8?) It is correct that the life-interest of Musammat Ramo ended with her death and her sisters became entitled to the possession of the property left by Balmokand. It is, however, denied that on the death of Musammat Nikko her share devolved upon her daughter, or that Musammat Nikko had any particular share According to *dharmashastra* and the law, the rights of life-interest which were proposed to be given to Musammat Nikko ceased with her death, and the entire property devolved upon her three

P. C.

Musammat Vaishno Ditti
v.
Musammat Rameshri.

Sir John Wallis.

sisters with life-interest The term in the compromise deed in this respect is null and void and unacceptable, and the other daughters of L. Balmokand or their children are not bound by any such term. The last portion of para. 12 of the plaint is, therefore, denied.

The plaintiff put in a replication denying that the interpretation placed upon the contract was correct, or that the daughters were given only life-interest, or that no partition had been effected between them. Under the compromise each of the daughters was held to be the owner of a one-fifth share as her absolute property, and the compromise was binding on the defendants, who were parties to the suit. It was wrong to say that Nikko got no particular share; she got a one-fifth share and on Ramo's death a one-fourth share. It was further alleged that the rights which according to the compromise were given to Nikko devolved on her daughter on her death according to riwaj, and not on her other surviving sisters, as alleged in the written statement. Under the circumstances the dharmashastra did not apply to the rights of Nikko, or to the other daughters, nor were the parties governed by the dharmashastra.

What is described in the English translation of the written statement and the replication as a particular share clearly means a share not passing by survivorship to the other sisters, and it was further alleged that if the effect of the compromise was to give Nikko any more than such a share, it was null and void and unacceptable.

There was no express provision in the compromise decree as to what was to happen on Nikko's death leaving a daughter, and the written statements appear to mean that if under the compromise Nikko took a full estate descendible to her children, the compromise so far was null, void and unacceptable. Supposing the ordinary Hindu Law to apply, it might well be contended that the sisters had no power by means of the compromise to enlarge their estates, so as to prejudice the rights of the next male reversioners to succeed to the whole of the father's estate on the death of the last surviving daughter, though, even so, it might be argued that they could provide for the enjoyment of the estate until the death of the last survivor.

The only question properly arising on these pleadings was whether under the compromise the sisters took more than a life-estate, and, if so, whether such provision was binding, and, if not, was the plaintiff entitled to succeed by custom to her mother's share? If it had been intended to challenge the whole compromise on the ground that two of the minor defendants in the

P. C.

Musammat Vaishno Ditti v. Musammat Ramsahri.

Sir John Wallis.

suit had not been properly represented, as was done on the appeal to the Judicial Commissioner, this defence should have been specifically pleaded, so that the plaintiff might have notice of the possibility that the compromise might fail her and that she might have to rely entirely on the proof of custom. On the pleadings, as they stand, it is difficult to see how the first issue, "Are not parties bound by the (compromise) decree of 23rd June, 1910?" can be said to arise.

At the trial the plaintiff gave certain evidence, which will be considered later, that by general custom among the community a daughter's daughter succeeded to the inheritance in the absence of the daughter's son, and the defendants called no rebutting evidence at all.

With regard to this evidence, the District Judge observed that he did not think the plaintiff's witnesses in any way improved the status of the plaintiff as they were unable to quote any case. On the other hand, he declared, as well he might, that he was unable to understand why the compromise should not be declared binding on the parties, and it is, therefore, obvious that the point that the guardian *ad litem* of defendants 5 and 6 had an adverse interest, was not raised before him, any more than it was in the written statement. He accordingly held that the compromise was by way of a *bona fide* settlement of a family dispute, and that its validity could not be questioned.

On issue (2) he held that under the compromise Nikko became entitled on her sister Ramo's death to a one-fourth share which descended to her daughter. As regards issue (3), as to plaintiff's right of inheritance, if the compromise was not binding, he considered it unnecessary to discuss it at any length, and merely observed, "Anyhow, in equity she (the plff.) would be entitled to the share of her mother, and I don't think that the other daughters of Balmokand would in any way bar those children of inheritance."

The grounds of objection to the compromise were, for the first time, adumbrated in the grounds of appeal, in which it was alleged that it was not binding on the minor parties to the suit because it was wholly against their interests, which were not represented and considered, and because the rules of procedure regarding compromise were not complied with. It was only at the hearing of the appeal that the specific objection was taken that the 5th and 6th defendants were not properly represented because the Court had appointed a guardian *ad litem* whose interest

P. C.

Musammat Vaishno Ditti v. Musammat Rameshri.

Sir John Wallis.

was adverse to those minors contrary to the provisions of Order 32, Rule 4 of the Code of Civil Procedure for the reasons which have been already set out.

On appeal the Judicial Commissioner held that in consequence of this objection the compromise could not be binding on the minor 5th and 6th defendants, and held further that the compromise was opposed to Hindu Law if its effect was to make the daughters hold as tenants-in-common instead of jointly with rights of survivorship. In the result he held the compromise not binding on any of the defendants, allowed the appeal, and dismissed the plaintiff's suit.

In their Lordships' opinion there were clearly no merits in the objection to the compromise taken at a late stage of the case that the minor 5th and 6th defendants had not been properly represented. The terms of the compromise were approved by the next friend of the minor plaintiff and the guardian *ad litem* of the minor 4th defendant, who were in the same interests as the 5th and 6th defendants, and were further carefully considered and approved by the District Judge. Even so the question remains whether the failure to observe this important provision of the Code would not, when properly raised, have the effect of invalidating the compromise so far, at any rate, as regards the shares of the 5th and 6th defendants.

This is a question with which their Lordships consider it unnecessary to deal, because, in their opinion, the plaintiff is entitled to succeed on another ground. As already stated, the District Judge found on the third issue that the plaintiff was entitled to succeed to her mother's share independently of the compromise, but based this decision on grounds of alleged equity rather than custom, because in his opinion the plaintiff's evidence as to custom did not help her case as the witnesses were unable to quote any instances in support of their deposition, while the Judicial Commissioner reversed this finding on the ground that the plaintiff had no right to succeed to her mother's share as under Hindu Law it passed to her sisters by survivorship.

Having regard to the conditions existing in this part of India, both the Lower Courts erred, in their Lordships' opinion, in disregarding the unrebutted evidence of custom which was given by the plaintiff as to her right to succeed to her mother's share because it was unsupported by instances. Section 27 of North-West Frontier Province Regulation VII of 1901, which

P. C.

Musammat Vaishno Ditti v. Musammat Rameshri.

Sir John Wallis.

corresponds with section 5 of the Punjab Laws Act, 1872, is as follows:—

In questions regarding inheritance, special property of females, betrothal, marriage, dower, adoption, guardianship, minority, bastardy, family relations, wills, legacies, gifts, partition, or any religious usage or institution, the rule of decision shall be—

(*a*) Any custom of any body or class of persons which is not contrary to justice, equity and good conscience, and has not been declared to be void by any competent authority.

(*b*) The Mahomedan Law, in cases where the parties are Mahomedans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by any such custom as is referred to in the preceding clause of this section.

Now it has been laid down by Robertson, J., in *Daya Ram* v. *Sohel Singh*,[1] in a passage approved by this Board in *Abdul Hussein Khan* v. *Bibi Sona Dero*,[2] under the corresponding section 5 of the Punjab Laws Act, 1872, that that section raises no presumption that parties are to be governed by custom rather than by their personal law, and that the personal law of the parties must be applied unless the custom is proved. It may seem at first sight that this view of the section gives no effect to clause (*a*) which requires the succession to be governed by any custom applicable to the parties concerned, and that the law would be the same if this clause had been omitted. In a sense, this may be so, but their Lordships are of opinion that in putting custom in the forefront, as the rule of succession, whilst leaving the particular custom to be established as it necessarily must be, the legislature intended to recognise the fact that in this part of India inheritance and the other matters mentioned in the section are largely regulated by a variety of customs which depart from the ordinary rules of Hindu and Mahomedan Law.

In these circumstances it has been rightly held in the Lahore Court in the case above mentioned that, where a custom is alleged, a duty is imposed on the Courts to endeavour to ascertain the existence and nature of that custom; and the Local Government has come to their assistance by establishing a *riwaj-i-am* or record of custom in the different parts of the Punjab, including the North-West Frontier Province which was formerly included in it. It has been held by this Board that the *riwaj-i-am* is a public record prepared by a public officer in discharge of his duties and under Government rules; that it is clearly admissible in evidence to prove the facts entered thereon subject to rebuttal;

1. (1906) P.R. 390.

2. (1917) L.R. 45 I.A. 10: I.L.R. 45 C. 450: 34 M.L.J. 48 (P.C.).

P. C.

Musammat Vaishno Ditti v. Musammat Rameshri.

Sir John Wallis.

and that the statements therein may be accepted even if unsupported by instances [*Beg* v. *Allah Ditta*[3] and *Ahmed Khan* v. *Channi Bibi*.[4]]

Further, manuals of customary law in accordance with *riwaj-i-am* have been issued by authority for each district, and in their Lordships' opinion stand on much the same footing as the *riwaj-i-am* itself as evidence of custom.

In these circumstances their Lordships are of opinion that, even though there be no evidence of instances, still, if the custom spoken to by the party's witnesses is in accordance with the custom applicable to his community according to the manual of the customary law of the district, there is sufficient *prima facie* evidence of the existence of the custom, subject, of course, to rebuttal, and that it ought not to be held insufficient merely for want of instances.

Their Lordships will now proceed to deal with the facts of the present case in the light of these observations. There is no repetition in the written statement in this case of the allegation that the eldest sister took no share in her father's estate by reason of her having been married during his lifetime; and it was admitted that on the death of the minor sister Ramo without issue her share devolved on her sisters, including Nikko. What was denied was that on Nikko's death her share devolved on her daughter or that the compromise could make it so devolve.

As regards the custom, there was the evidence of the two witnesses for the plaintiff, that in the community of the Arora Sikhs, to which the parties belong, a daughter's daughter succeeds to the inheritance in the absence of a daughter's son, and there was no evidence the other way. Though the witnesses were unable to speak to any instances in which the custom had been observed, their evidence is entirely in accordance with what is laid down in the Customary Law of the Peshawar District, at page 32, that in the event of a daughter entitled to inherit having predeceased her father her share may be taken by her issue. If, as here stated, in the event of a daughter dying *vita patris*, her daughter is entitled to succeed by representation, it appears to their Lordships to follow *a fortiori*, that a daughter's daughter must be entitled to the share which had devolved upon her mother; and it may be observed in conclusion that this is what was expressly provided in the mother's will which would appear to have been intended rather to safeguard the property than to

3. (1916) L.R. 44 I.A. 89 at 97: I.L.R. 44 C. 749: 32 M.L.J. 615 (P.C.).
4. (1925) L.R. 52 I.A. 379 at 383: I.L.R. 6 Lah. 502 (P.C.).

make any alteration in her daughters' rights of succession to their father's property.

P. C.

Musammat Vaishno Ditti v. Musammat Rameshri.

Sir John Wallis.

For these reasons their Lordships are of opinion that the custom relied on for the plaintiff is sufficiently established in the absence of any evidence to the contrary, and that this appeal should be allowed and the decree of the District Court restored subject to the following modifications, (*a*) that the appellant be granted a decree for a one-fourth share of the moveable and immoveable property, and (*b*) a decree for rendition of accounts as from the 23rd June, 1910, with respect to her share, with rents, profits and interest, with costs here and in the Lower Appellate Court, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *H. S. L. Polak.*

Solicitors for respondents: *Downer & Johnson.*

K.J.R. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SRINIVASA AIYANGAR AND MR. JUSTICE REILLY.

Kodali Tiruvengalaratnam *alias* Tiruvengalam and another .. *Appellants** (*Defts.*)

v.

Kodali Butchayya .. *Respondent* (*Plff.*).

Tiruvengalaratnam v. Butchayya

Hindu Law—Adoption—Authority to adopt—Construction—Choice of boy—Restriction on widow as regards—What amounts to—Power given to two widows to adopt—Joint power or power to be exercised by senior widow with the concurrence of the junior—Both widows participating in adoption—Validity of adoption in case of—Adoption by both or by senior widow only—Validity of joint power to adopt—Trusteeship vested in widow in right of husband—Adopted son if divests

The material portion of the will of a Hindu giving his two widows authority to adopt was as follows:—

"If my younger brother *T* should beget sons you should take in adoption any of these children or the children of any other persons if you are desirous of doing so and at a time when you wish to do it."

Held, on a construction of the will, (1) that it was not obligatory on the widows to adopt a son of the brother of the deceased, and that the adoption made by them of any other boy was not invalid, and (2) that the direction to adopt was merely to the effect that, unless both the widows should be willing, no adoption should be made, and that the boy to be adopted should be chosen by both Where it appeared that in making the

---

*Appeal No. 402 of 1923. 1st August, 1927.

Tiruvengalaratnam v. Butchayya.

adoption directed by the will both the widows of the deceased participated. *held further,* that the act of adoption should be deemed to have been made only by the senior widow and to herself as mother, and that the adoption was not, therefore, invalid on the ground that it was made by both the widows.

Quaere, whether an adoption to a deceased person can under the Hindu Law be made by more widows than one of his and *Quaere* as to the validity of a joint power to adopt given to two or more widows.

On an adoption made by a Hindu widow, the office of trustee vested in her as heir to her deceased husband becomes divested and vests in the adopted son just like all other property of the deceased.

Appeal against the decree of the Court of the Subordinate Judge of Bapatla in O.S. No. 56 of 1919.

[This appeal first came on for hearing on 17th and 21st February and 5th May, 1927 before their Lordships the Chief Justice and Srinivasa Aiyangar, J.]

T. V. Venkatarama Aiyar for appellants.

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for respondent.

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—The question that arises for determination in this appeal is of considerable difficulty and great interest in the Hindu Law of Adoption though it is not likely to arise frequently. It is no doubt in connection with the office of trusteeship of a temple claimed by the plaintiff jointly with the 1st defendant that the question has arisen, but the main point raised and discussed in appeal before us related to the validity of the adoption on which the plaintiff has based his right.

The learned Subordinate Judge in the Court below found in favour of the adoption and upheld the plaintiff's claim and granted a decree. The defendants have appealed.

Two points have now been argued on behalf of the appellants in this appeal and one of them is a comparatively small one and may be disposed of immediately.

Ex. A is the will of the deceased Buchayya by which he gave authority to his two widows Pullamma and Lakshmamma to make an adoption. The portion of the will referring to the adoption has been translated thus:

"If my younger brother Tiruvengalam should beget sons you should take in adoption any of these children or the children of any other persons if you are desirous of doing so and at a time when you wish to do it."

The contention put forward with regard to this clause in the will is that the adoption made by the widows not having

Tiruvengala-ratnam v. Butchayya.

Srinivasa Aiyangar, J.

been of a son of the 1st defendant, cannot be regarded as valid. The argument was that in his clause the testator has given a direction that in making the adoption preference should be given by the widows to a son of his brother Tiruvengalam. The learned Subordinate Judge has found against this construction of the will. We are satisfied that the construction placed on the will by the learned Subordinate Judge is correct. In fact there is a great deal to be said in favour of the view adopted by the Lower Court that it was only in the event of the 1st defendant having more than one son that the testator intended that his widows may, if they should have no objection, adopt one of his sons. It is quite possible that the testator did not contemplate his brother being deprived of his only son by adoption in the event of the brother not having more than one son. Further it is only if the widows should be desirous of doing so, it is stated, that they should take in adoption one of the sons of the brother. We have, therefore, very little hesitation in repelling the contention. The other question however is more difficult of solution. In making the adoption it is admitted that both the said widows of the deceased testator participated. On this it has been argued that under the Hindu Law the adoption to a deceased husband can be made only by one of the two widows duly authorised and that the adoption made by both the widows must be regarded as invalid. For this purpose Mr. T. V. Venkatarama Aiyar, learned vakil for the appellants, strongly relied upon the observations of their Lordships of the Judicial Committee in the case of *Narasimha* v. *Parthasarathy*.[1] No doubt at page 220 of the report Lord Moulton delivering the judgment of their Lordships observes as follows:—

"In the next place only one wife can receive the child in adoption so as to step into the position of being its adoptive mother. This is evident from the cases which establish that the receiving mother acquires in the eye of the law the same position as a natural mother to such an extent that her parents become legally the maternal grandparents of the child. To hold that a child could bear such a relationship to more than one mother would be entirely contrary to settled law and would produce inextricable confusion in the law of inheritance."

But it must be observed that having made these observations their Lordships proceed to state that

"it is not necessary that these points should be decided and they desire to express no opinion upon them and will assume for the purposes of their decision that the respondents are right in their contention that such a

1. (1913) L.R. 41 I.A. 51: I.L.R. 37 M. 199. 26 M.L.J. 411 (P.C.).

Tiruvengala-ratnam v. Butchayya.

Srinivasa Aiyangar, J.

joint power of adoption given to the two widows was, if properly interpreted, a valid power, and that if they had agreed to a person to be chosen for such adoption they could have validly executed the power."

Thereupon their Lordships proceed to construe the power in question in that case having regard to the surrounding circumstances and contemporaneous documents put in evidence and state that according to the true intention of the donor the power given was a joint power to both the widows and come to the conclusion that as it was a joint power it could not validly be exercised after the death of one of the donors of the powers as *persona designata*.

Special reference may also be made in this connection to the following observations in the judgment of their Lordships at the bottom of page 220:

"But it does not follow as a matter of necessity from these considerations that a power given to more than one wife to adopt must be an invalid power. In many matters custom solves difficulties which appear to be insoluble when the questions are considered from a purely logical point of view. In the very question that is before their Lordships there are indications in the cases cited that in some parts of India such a power might perhaps be interpreted as giving a preferential right of adoption to the first wife."

From the fact that both the widows are the donors of the power to adopt, it follows that the power must be exercised by both or with the concurrence of both, and any adoption made by only one of the widows is open to the obvious objection that an adoption made by the exercise of the power only by one of the donees is invalid.

The question thus resolves itself into whether by the mere concurrence in making the adoption of both the widows there is anything in Hindu Law to make the adoption itself invalid. Though the observations of their Lordships of the Judicial Committee above cited are very strong with regard to the invalidity of an adoption made to two widows at the same time, these observations were not, it must be noted, required for the decision of the case before them. It may also be observed that after all an adoption in Hindu Law is based on what is essentially a fiction and there must be obvious limits to the extension of such a fiction and if the fiction should be regarded as substituting adoption in the place of the natural birth of the son, it must follow that a bachelor cannot validly adopt and this is certainly not the law as recognised.

If it be merely regarded as a fiction there must be no difficulty whatever in a person bearing the same relationship to

Tiruvengala-ratnam v. Butchayya.

Srinivasa Aiyangar, J.

two or more persons. However it seems to us that having regard to the genius of the Hindu Law and what may be regarded as the custom and consciousness of the community at large at any rate in South India, it will be more in accordance with the reason of the thing, the principle applicable and the observations of their Lordships of the Judicial Committee to regard the adoption in this case as having been made by and to the senior widow Pullamma though with the concurrence of the other widow.

Apart from the observations of the Judicial Committee referring to the possibility of an adoption made in those circumstances being so regarded, there is clear authority in this Court in favour of such a view. In the decision in the case of *Rajah Venkatappa Nayanim Bahadur* v. *Ranga Rao,*[2] to which one of us was a party, it was held by the learned Chief Justice that an adoption made by a junior widow with the consent of the sapindas but without the consent of the senior widow was invalid in law. The decision in that case clearly proceed on the recognition of the preferential rights of the senior widow as regards religious rites. The learned Chief Justice has given reference to various Hindu Law texts in support of that view. In the same case the decision of this Court by Sankaran Nair and Spencer, JJ., in the case of *Kakerla Chukkamma* v. *Kakerla Punnamma*[3] where it was held that the senior widow had a preferential right to adopt and that so long as that preferential right subsists the junior widow has no right to adopt was cited with approval and it was also indicated that any other view might have the effect of tending to unsettle the former decisions of this Court and give encouragement to its being challenged in other cases.

We may also in this connection refer to the text of Kathyayana where the first and senior wife is said to be the *dharma-pathni,* that is to say the wife wed for the purpose of performing religious rites and duties and the second and succeeding wives spoken of as merely for the purpose of love or lust. Again in the chapter treating of *Vivaha-samskara* it is stated in the commentary that after the sacrificial fire is created along with one wife the wives afterwards taken do not acquire equal rights with the first wife in respect of the oblations unless both the wives together again officiate in creating a new sacrificial fire. In the Shastras are to be found scattered about many texts which give prominence to and recognise the superiority of the first wife or the *dharma-pathni.*

2. (1915) I.L.R. 39 M. 772. 29 M.L.J. 18.
3. (1914) 28 M.L.J. 72.

Tiruvengalaratnam v. Butchayya.

Srinivasa Aiyangar, J.

There is also a well-established rule that when the husband dies sonless, the funeral ceremonies should be performed only by the first and senior wife. Again, as in the making of *Datha-homam*, only one person can at a time perform the *Homam* and it cannot be performed by both or on behalf of both simultaneously. Hence also it is deducible that though both may be present and participate in the performance of the *Homam* it is shastraically performed only by the senior and deemed to have been performed only by her.

Having regard to all these and other similar texts and considerations recognised by several decisions in this Court, it is clear that even though both the widows might have concurred in making the adoption the act of adoption should be deemed to have been made only by the senior widow and to herself as mother. In that case it is pointed out by their Lordships of the Judicial Committee that the other wife who participates becomes only a step-mother. Assuming, therefore, that the authority in this case given by the husband to his two widows to adopt should be construed only as a joint power, that is a power to be exercised by both of them, that condition has been fulfilled in this case because admittedly both the widows participated in the ceremony. But there is no necessity to regard the adoption as having been made to both the mothers more especially if it is to be supposed that there can be no valid or legal adoption to two mothers at the same time. We must assume that a Hindu husband who for the purpose of continuing his line and providing for the purpose of performance of religious ceremonies for the salvation of his soul and authorising an adoption to be made did not authorise an invalid adoption. The reasonable construction to be placed on the terms of the will is that the direction was merely to the effect that unless both the wives should be willing no adoption should be made and that the boy to be adopted should be chosen by both. On the adoption being made the appropriation of the son to the senior wife would almost seem to be by process of shastraic reasoning.

No question in this case arises with regard to the adoption made to the husband having been either to the one or the other wife as mother. Having regard to the nature of the rights claimed the only question is whether it has been a valid adoption to the deceased testator. If, therefore, we find that there was a joint power to adopt and that in the exercise of that power there has been a valid adoption it follows that so far as that question is concerned the plaintiff's right must be upheld.

Tiruvengalaratnam v. Butchayya.

Srinivasa Aiyangar, J.

The plaintiff has in this suit claimed only as trustee in succession to his adoptive mother.

At this stage it is intimated on behalf of the appellants that in the view taken by us with regard to this question there are other questions raised on behalf of the appellants which would require to be considered and decided. For this purpose the case will be posted for hearing after the long vacation before any Bench hearing first appeals. Costs reserved.

[This appeal came on for final hearing on 1st August, 1927, before their Lordships Srinivasa Aiyangar and Reilly, JJ.]

The judgment of the Court was delivered by

Srinivasa Aiyangar, J.

Srinivasa Aiyangar, J.—This case came up originally for disposal before the learned Chief Justice and myself when two points of a preliminary character were argued for the appellants by their learned vakil. Now after the judgment has been delivered with regard to those two points, he intimated that there were other questions which he wished to raise on behalf of the appellants and it was necessary that those points should also be considered and disposed of.

Mr. Venkatarama Aiyar, the learned vakil, has now raised a very ingenious contention. The plaintiff in this action having sued for joint possession of the office of trusteeship along with the 1st defendant, it has been contended by Mr. Venkatarama Aiyar that the office of trusteeship was not on the date of the suit and is not even now vested in the plaintiff in such a manner as to entitle him to any such relief or possession because on the death of the adoptive father of the plaintiff his two widows succeeded to the office of trusteeship. Those two widows are still alive. They must still be regarded as having vested in them the trusteeship. Though the plaintiff might, having regard to the judgment of this Court, be regarded as having been validly adopted to the deceased, still such an adoption could only have the effect of divesting the widows only with regard to the private family property which has become vested in them as the legal representatives of their husband and must be limited to the property in which the deceased had a beneficial interest. There is no principle of law on which it can be held that the adoption by a widow of a person to her deceased husband has the effect of divesting not merely the personal estate which she has inherited from her husband but also any office such as the office of a trusteeship wihch she might have inherited from him. I think it might be conceded that there is no direct authority for the position that the adoption by a widow has the effect of divest-

Tiruvengalaratnam v. Butchayya.

Srinivasa Aiyangar, J.

ing her of the office. It may be that there is no such decision because no one ever thought of raising any such contention. Practically, therefore, this question has to be considered and disposed of merely on the general principles of Hindu Law applicable to the point. The only case on which Mr. Venkatarama Aiyar placed great reliance for the purpose of supporting his contention was the one reported in *Mallikarjuna* v. *Sridevamma.*[4] That was a case of a promissory-note. The suit was instituted by the widow who had succeeded as trustee in respect of certain choultry charities to her husband. In the High Court the adopted son was made a party and the defendant against whom the decree was passed appealed to the Privy Council and their Lordships in their judgment have dealt only with two pleas and contentions argued on behalf of the defendants-appellants. It was not contended in that case that the plaintiff who was suing on the note as representing the charity did not fill that character and no issue arose as to whether the trusteeship had then become vested in some other person. In fact Mr. Venkatarama Aiyar, while conceding that there was no plea of that character in that case and therefore no discussion of the question, merely argued that, if such contention was open, it was unlikely that the same would not have been put forward by the very learned counsel before their Lordships. However, having regard to the decision, it is perfectly clear that there are no statements in it and it is not a decision for any point that arises in this case. On the finding of their Lordships that the plaintiff filled in that case the character of the trustee of the charities on behalf of which she was suing to recover the amount of the promissory-note it became clear that none of the questions that are argued here could have arisen. Then what is the principle on which the succession to the office of trusteeship depends? Primarily, as argued by Mr. Venkatarama Aiyar himself, it depends upon the original terms of the foundation of the trust. If according to those terms a line of succession was prescribed, that would have to be followed. If not, it is clear that the trustee that is appointed will take office and will transmit the office to his heirs in succession if the true intention of the maker of the trust was that the office should be hereditary in the trustee. If not, there is also authority for holding that the trusteeship will revert to the family of the founder. In this case the curious point to be observed is that in the written statement filed on behalf of the defendants the office of trusteeship is clearly regarded, dealt with and con-

4. (1897) L.R. 24 I.A. 73: I.L.R. 20 M. 162 (P.C.).

Tiruvengalaratnam v. Batchayya.

Srinivasa Aiyangar, J.

tended to be just like all the other property of the family passing by survivorship and by succession. There was no plea put forward in the Lower Court that the line of succession according to the rule of this institution was anything but hereditary. In fact it may be observed that the fact that the trusteeship is hereditary is the common foundation of the case of both the parties. In such a case what is to be observed is that the trusteeship, whether it is in the family of the trustee or in the family of the founder, must be held to vest in all persons who at the particular moment constitute the family, or, in other words, represent the family. There is no question of partition at all. Mr. Venkatarama Aiyar referred to the case in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj*[5] and other cases where it was held that the office of trusteeship cannot be made the subject of a partition by a Court of law. There is no question of partition at all in this case. It is only an instance of the office coming to be held by a number of persons at the same time as joint possessors of the office. The prayer in the plaint in this case is only for that purpose. If according to the contentions which were common to both parties in this case the office of trusteeship was hereditary in this family then the simple question is who at the time of the institution of this suit should be regarded as representing the members of this family. Undoubtedly the plaintiff and the defendants. No doubt before the adoption the two widows represented their deceased husband, but their representative character continued and must be deemed to have continued until a valid adoption was made to their deceased husband. From the moment of that adoption they ceased to represent their husband, the family and the family estate and such representation became vested only in the adopted son. Therefore it follows that according to the assumed intention of the founder or according to the admitted rule of this institution the trusteeship should be regarded as hereditary in this family and it follows from the adoption of the plaintiff the right to the office became vested in him. The matter may be put also in a slightly different manner. If as admitted, in the absence of any special provision with regard to succession to the office of trusteeship the ordinary rule of inheritance should be followed, it is clear that the ordinary rule of inheritance being that the husband's estate becomes divested on a valid adoption being made and the office being property like other properties, it follows that this office which the widow is divested of be-

5. (1897) I.L.R. 19 A. 428.

Tiruvengalaratnam v. Butchayya.

Srinivasa Aiyangar, J.

comes vested in the adopted son. In fact, in the case of *Thandavaroya Pillai* v. *Shunmugam Pillai*[6] it was held by the learned Judges that when a trusteeship is vested in a family and the members of the family remain undivided, the senior member of the family is entitled to manage the family properties and also exercise the right of management vested in the family on behalf of the trust. They add at page 169:

"But until partition no junior member is entitled to management of the trust in rotation any more than he is entitled to such possession or management of any family property."

The decision in this case seems clearly to point to the view of the learned Judges that there was no difference in this matter between the office of trusteeship and the estate of the family. Another case also cited by the learned vakil for the appellants is *Kunjamani Dasi* v. *Nikunja Behari Das*.[7] In this case the learned Judges say that, when the office has become vested in persons woh at the time constitute the heirs of the founder, upon the death of each member of the group it passes by succession to his heir. That also makes it abundantly clear that, when the office is held by a number of persons jointly, the right to the office on the death of any of the joint holders passes to his personal heirs, *i.e.*, to those who would be his heirs in respect of his separate property. If so, it is difficult to see how on a widow making a valid adoption to her deceased husband and all the estate the right, title and interest of her husband becoming immediately vested in the adopted son, only the office of trusteeship continues to remain vested in her. It is unnecessary to refer at great length to all those decisions, many of them by their Lordships of the Judicial Committee, where effect has been given to the theory of the Hindu Law that the adopted son must for most purposes be regarded as having been born at the time of the death of the person to whom he is adopted. If the adopted son had been in existence, it cannot be denied that the office would have passed on to him and reference need not also be made to the cases where it has been held that the vesting of the estate in the widow who has had from her husband authority to adopt is a sort of a suspended vesting and liable at any time to be divested on the exercise of the power. In fact, the effect of divesting has been extended even to collaterals as has been justly pointed out by Mr. Alladi Krishnaswami Aiyar. We are therefore of opinion that there is on point in the contention that the plaintiff did not succeed to the office of trusteeship on

6. (1908) I.L.R. 32 M. 167: 19 M.L.J. 59.
7. (1915) 22 C.L.J. 404.

his being validly adopted as has been found by this Court already.

None of the other points which were raised in the Court below have been argued before us. It follows that the appeal fails and must be dismissed with costs.

The memorandum of objections is dismissed with costs, but any claim therein may be made the subject-matter of a separate suit.

Reilly, J.—I agree.

A.S.V. *Appeal dismissed.*

Tiruvengalaratnam *v.* Butchayya. Srinivasa Aiyangar, J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE CURGENVEN.

T. S. Ragupathi Aiyar .. *Petitioner* in all (Complainant)*

v.

Narayana Goundan .. *Respondent (Accused).*

Ragupathi Aiyar *v.* Narayana Goundan.

Penal Code (XLV of 1860), S 425—Mischief—Putting property to its normal use if can amount to—Forest—Grazing rights in, reserved for holders of permits—Grazing of cattle in case of, by person without permit—Offence of which he is guilty—Mischief—Theft.

The grazing of goats—or, for the matter of that, any species of cattle—does not, in cases where profit is derived from the grass not by cutting or selling it but by allowing it to be grazed by holders of permits, necessarily cause to the grass grazed such damage by destruction, etc., as will constitute the offence of mischief within the meaning of S. 425 of the Penal Code, because in such cases the graziers, by allowing their goats or cattle to graze, do no more than put the grass to its normal use. The expressions "destruction of any property," "such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously" contained in S. 425, Indian Penal Code, carry the implication that something should be done to the property contrary to its natural use and serviceableness.

Quaere: Whether in such cases the graziers would be guilty of theft

Petition under sections 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Tirupathur in Criminal Appeals Nos. 36, 38 and 39 of 1927 preferred against the judgment of the Court of the Sub-Magistrate of Tirupathur in Calendar Cases Nos. 110, 112 and 113 of 1927.

V. L. Ethiraj and *P. Krishnamachari* for petitioner.

C. Veeraraghava Aiyar for *K. N. Arunachala Aiyar* for respondents.

The Public Prosecutor on behalf of the Crown.

---

*Cr.R.C. Nos. 996, 998 and 999 of 1927. 5th September, 1928.
Cr.R.P. Nos. 898, 900 and 901 of 1927.

Ragupathi Aiyar v. Narayana Goundan.

The Court made the following

ORDER.—The respondents in these Criminal Revision Petitions, and in two or three others which have since been withdrawn, were convicted of mischief, under section 426, Indian Penal Code, by the Sub-Magistrate, Tirupathur, and sentenced to pay fines, but the convictions were reversed by the Joint Magistrate, Tirupathur, on appeal. The petitioner is agent to the Mittadar of Bommai Kuppam, and was complainant in the criminal prosecutions. The case against each respondent was that he unlawfully allowed goats to graze in the Mitta forest, grazing rights being restricted to holders of permits, and in this way committed the offence in question. Arguments for revision have been based upon the terms of the judgments to which Civil Revision Petition No. 996 of 1927 relates.

In order to establish the offence of mischief, as defined in section 425, Indian Penal Code, it must be shown that the accused "with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously."

The only passage in the Sub-Magistrate's judgment on the question of wrongful loss or damage is this:

> "In cases of goat browsing in forests, it is an accepted principle that the damage caused is detrimental to tree growth and it is very difficult to arrive at any valuation of the damage caused."

At that stage of the case, it was believed that tree growth was involved. But before the Joint Magistrate it was conceded that no cutting of branches or damage to trees had been made out, so that the question which the learned Joint Magistrate had to consider was whether the grazing of goats in the forest—using 'grazing' in its strict sense of allowing cattle to feed upon growing grass—necessarily occasioned such damage to the grass as would satisfy the terms of section 425, Indian Penal Code. The conclusion expressed was that the damage caused was "only incidental to the business of goat grazing and of the sort committed by other (*sic*) licensed graziers," and that complainant's remedy was the civil one of enforcing the payment of grazing fees.

Now it will be seen that whatever knowledge the Court might be entitled to import—as the Sub-Magistrate imported it—as to the havoc wrought by goats in browsing on trees, bushes, etc., is not in question. All that I am asked to decide is whether the grazing of goats—or, for the matter of that, any species of

Ragupathi Aiyar v. Narayana Goundan.

cattle—necessarily causes to the grass grazed such damage by destruction, etc., as will constitute the offence of mischief. For the petitioner some reliance is placed upon an old case of this High Court in *Gurram Siddugadu, In re*,[1] in which the facts were that the accused grazed their cattle upon Government lands which it was under contemplation to reserve under the Forest Act, and on which, therefore, the grazing of cattle had been prohibited. The evidence showed that Government were in the habit of selling the grass grown on the lands, and the learned Judges found that the consumption of the grass caused the destruction of it, so far as the Government right was concerned. "The grass on the land," they observe, "in the possession of the Government, by their officer, was a crop, though perhaps of little value, but one which was preserved." It appears to me that this circumstance in some measure differentiates the facts from a case, like the present cases, where profit is derived from the grass not by cutting or selling it but by allowing it to be grazed; and the question arises whether the offence of mischief is committed when property is dishonestly put to a use of the kind for which it is intended. In a case decided by the Calcutta High Court in 1874, *Shakur Mahomed* v. *Chunder Mohan Sha*,[2] the point arose whether the cutting and removal of bamboos, provided it were done with the necessary intention or knowledge, was mischief. In referring the case, the Sessions Judge observed:

> "The mischief of which the accused was convicted consists in cutting and taking away certain bamboos, the right to which was disputed. The essence of the offence of mischief is that the offender must cause the destruction of property or such change in it or in its situation 'as destroys or diminishes its value or utility, or affects it injuriously.' Now, as bamboo is a thing which is grown to be cut, the cutting and removing it does not amount to its destruction or other injury defined above."

The Bench which disposed of this reference concurred in this view of the law and quashed the conviction. The same reasoning was adopted by a learned Judge of the Patna High Court in dealing with a case of cutting the branch of a tree in *Sardar Singh* v. *Emperor*[3] and was the basis of a distinction drawn between cutting an unripe crop, which might constitute mischief, and cutting a crop ready for reaping, which would not: *Mahomed Foyaz* v. *Khan Mahomed*[4] and *In the matter of Miras Chowkidar*.[5]

1. 1 Weir 492.
2. (1874) 21 W.R. (Cr.) 38.
3. (1917) 44 I.C. 451.
4. (1872) 18 W.R. (Cr.) 10.
5. (1903) 7 C.W.N. 713.

Ragupathi Aiyar v. Narayana Goundan.

The expressions "destruction of any property," "such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects it injuriously," contained in section 425, Indian Penal Code, appear to me to carry the implication that something should be done to the property contrary to its natural use and serviceableness. It may be mischief to throw the contents of a pot of food upon the fire, but it is not mischief, though it may be theft, to eat the food. And so here, since the graziers, by allowing their goats to graze, did no more than put the grass to its normal use, by the same reasoning their act would not amount to mischief, though it may have amounted to theft. As to this, that offence not having formed the subject of the charge, I do not wish to express a more definite opinion.

A.V.S. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE MACKAY.

B. Raja Rajeswara Sethupathi Avergal, *alias* B. Muthu Ramalinga Sethupathi Avergal, Rajah of Ramnad .. *Appellant** (*Plff.*)

v.

The Right Honourable The Secretary of State for India in Council through the District Collector of Ramnad at Madura . .. *Respondent* (*Deft.*).

Rajah of Ramnad v. Secretary of State for India.

Indian Income-tax Act (*VII of* 1918), *Ss.* 3 *and* 52—*Permanently settled estate—Income from forests and fisheries—If liable to income-tax—Assessment of such income—Suit to recover the amount paid—Maintainability—Mistake of law—Money paid under—If can be recovered.*

Income derived from forests and fisheries in a permanently settled estate in which the peishcush had been fixed in commutation, not only of the rentals of the cultivated lands but also of all income which might be derived from forests and fisheries, is not liable to be taxed under the Indian Income-tax Act.

The Chief Commissioner of Income-tax, Madras v. *Zamindar of Singampatti,* (1922) I.L.R. 45 Mad. 518 (F.B.) followed.

A civil suit to recover an amount paid as income-tax is not barred by S. 52 of the Indian Income-tax Act, if the tax was levied in respect of income which is not assessable under the Act.

A payment made under a mistake of law cannot be recovered.

The holder of a permanently settled estate was required to make a return of his income for purposes of the Income-tax Act and he chose to include in the return the income from forests and fisheries which was not assessable under the Act. On the basis of that return, the Income-tax Officer assessed the

*Appeal No. 95 of 1927. 31st July, 1928.

Rajah of Ramnad v. Secretary of State for India.

income and, on notice being given, the assessee paid the tax. There was no evidence that the Income-tax Officer required the assessee to make a return of the income from forests and fisheries.

Held, that the payment was made under a mistake of the general law of British India applicable to all persons in the position of the assessee holding permanently settled estates, and not under duress or coercion, and consequently the amount paid cannot be recovered.

Appeal against the decree of the Court of the Subordinate Judge of Ramnad at Madura, dated 29th November, 1926 in O.S. No. 38 of 1925.

A. Krishnaswami Aiyar for appellant.

The Government Pleader for respondent.

The Court delivered the following

JUDGMENT.—This appeal is by the Rajah of Ramnad against the decree of the Additional Subordinate Judge of Ramnad at Madura dismissing his suit for the recovery of certain amounts paid by him as income-tax for three years. The Rajah of Ramnad was asked by the Income-tax Officer to make a return of his income taxable under the Income-tax Act (VII of 1918) under section 17 (2) read with section 2, clause (13). He submitted a return for the years 1919-1920, 1920-1921 and 1921-1922, in which he showed the income derived by him from forests and fisheries. The Income-tax Officer, on the basis of the return, proceeded to assess the income from forests and fisheries under section 18 of the Act. The Rajah paid the tax on 5th July, 1920, 25th April, 1921, and 21st April, 1922. He brought the suit on 22th June, 1925 for the recovery of the three sums paid on the dates abovementioned on the ground that the income from forests and fisheries derived from his permanently settled zamindari was not taxable under the Income-tax Act.

The first point urged by Mr. Krishnaswami Aiyar for the appellant is that the income derived from a permanently settled estate is outside the scope of the Income-tax Act by reason of the Permanent Settlement Regulation XXV of 1802 and the sanad issued under the Act, and, the act of the Income-tax Officer being *ultra vires,* he is entitled to a refund of the amount paid by him. In the view we take of the next point, it is unnecessary to discuss all the authorities bearing on this point in deail. In *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti,*[1] a Full Bench of this Court held that, where the peishcush of a permanently settled estate was fixed in commutation, not only of the rentals of the cultivated lands but also of

1. (1922) I.L.R. 45 Mad. 518 (F.B.).

Rajah of Ramnad v. Secretary of State for India.

all income which might be derived from forests or fisheries, both under the terms of the sanad and of section 1 of Regulation XXV of 1802, these incomes were exempt from further taxation by the Government, and section 3 of the Income-tax Act did not abrogate this exemption. The learned Judges considered the effect of the Permanent Settlement Regulation of 1802 and the terms of the grant to which the grant in the present case is similar and came to the conclusion that the income derived from forests and fisheries in the permanently settled estate was not liable to be taxed under the Income-tax Act. The learned Government Pleader attacks the correctness of this decision and contends that income from forests and fisheries is taxable unless it comes within the exceptions provided in the Income-tax Act. He urges that there must be specific legislation exempting such income and that it cannot be exempted by implication. Sitting as a Division Bench, we are bound by the decision of the Full Bench. We may observe that we entirely concur with the reasoning and conclusion of the learned Judges who were members of the Full Bench. Reliance is placed by the learned Government Pleader on *Emperor* v. *Probhat Chandra Barua*,[2] *Emperor* v. *Indu Bhusan Sarkar*,[3] *Emperor* v. *Probhat Chandra Barua*[4] and *Maharajadhiraj of Dharbanga* v. *The Commissioner of Income-tax*,[5] as supporting his contention that *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[1] was not correctly decided. In *Emperor* v. *Probhat Chandra Barua*[2] there was a difference of opinion between Rankin J. and Page J., Page J., approving of the decision in *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*.[1] In *Emperor* v. *Indu Bhusan Sarkar*,[3] *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[1] and *Maharajadhiraj of Dharbanga* v. *The Commissioner of Income-tax*[5] were followed by a Bench of the Calcutta High Court. In *Emperor* v. *Probhat Chandra Barua*[4] there was a difference of opinion, two Judges approving the Madras view and three Judges following the view of Rankin, J., in *Emperor* v. *Probhat Chandra Barua*.[2] In *Maharajadhiraj of Dharbanga* v. *The Commissioner of Income-tax*[5] Dawson Miller, C. J., after an exhaustive examination of the Permanent Settlement Regulation and its effect observed: "I see no reason to take a different view from that held by the Madras High Court," while Mullick, J., took a different view. We find this point in favour of the appellant.

1. (1922) I.L.R. 45 Mad 518 (F.B.).
2 (1924) I.L.R. 51 Cal. 504.
3 (1926) I.L.R. 53 Cal. 524.
4. (1927) I.L.R. 54 Cal. 863 (F.B.).
5. (1924) I.L.R. 3 Pat. 470.

It is contended by the learned Government Pleader that no civil suit would lie to recover an amount paid as income-tax. A civil suit is barred under section 52 of the Income-tax Act of 1918. If the tax was levied under the Act, no doubt a suit would be barred, but if the assessment was made in respect of an item of income which is not assessable under the Act, a civil suit would lie to recover it, inasmuch as the officer making the assessment had no jurisdiction to make it. In cases in which the Income-tax Officer has to decide whether a certain item of income is assessable or not, his decision cannot be said to be *ultra vires* even if it is illegal. But, where a certain income is outside the scope of the Act, such as agricultural income or income not earned in or brought into British India, any assessment in respect of such income would be outside the scope of the Act and a civil suit to recover it would not be barred by reason of section 52. We do not discuss this point at length as we find the next point against the appellant.

The next point is whether the appellant is entitled to recover the money paid under a mistake of law. As already observed, three payments were made on 5th July, 1920, 25th April, 1921 and 21st April, 1922 and the suit was brought on 22nd June, 1925. The suit in respect of the first two payments is clearly barred as it was brought more than three years after the date of payment. As the Court of institution closed on 20th April, 1925 and re-opened on 22nd June, 1925, the last payment was within the period of limitation. Granting that section 14 does not apply to the case, the question is whether the amount paid on 21st April, 1922 could be recovered in the circumstances of the case. It is well established that a payment made under a mistake of law cannot be recovered, but it is urged for the appellant that the payment was made under duress or coercion and therefore the amount is recoverable. The decision in *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[1] was on 21st February, 1922. The assessment notice was dated, 31st March, 1922 and payment was made on 21st April, 1922. The Rajah of Ramnad in his return of taxable income made in pursuance of the Income-tax Act included wrongly the items of income derived from forests and fisheries.

He says this return was made owing to a mistake, and, on the figures submitted by the Rajah, the Income-tax Officer assessed the income under the Income-tax Act. The question is whether the payment was made under duress in order to take it

1. (1922) I.L.R. 45 Mad. 518 (F.B.).

Rajah of Ramnad v. Secretary of State for India.

out of the principle that payments under mistake of law cannot be recovered. It is contended for the appellant that the sending of notice by the taxing authority and his assessment amount to duress or coercion in law. The Rajah, of his own accord, and, it may be, owing to ignorance of law, included, in the items shown as taxable under the Income-tax Act, the income from fisheries and forests and the Income-tax Officer on the basis of that return made the assessment under the Act. There is no evidence that the Income-tax Officer required the appellant to make a return of the income from forests and fisheries. The appellant like all other assessees was required to make a return of his income for purposes of Income-tax Act and if he chose to include in the return an item of income which was not assessable under the Act and if on the basis of that return the Income-tax Officer assessed the income, and, on notice being given, the assessee paid the tax, it cannot be said that it was paid under duress. In *William Whiteley, Ltd.* v. *The King*[6] the facts were: William Whiteley, Ltd., who carried on a large business in which they employed a large number of assistants who had all their meals on the premises and for the service of those meals they employed a large number of men as cooks and waiters, and on the suggestion of the Inland Revenue authorities that the waiters were "male servants" in respect of whom duties were payable paid for a number of years the duties in respect of such waiters. From 1903 they paid the duties with a protest that the waiters were not "male servants" within the meaning of the Act. In 1906 they refused to pay and upon proceedings being taken for penalties, the Divisional Court held that the waiters were not "male servants" and that the duties were not payable. They then preferred a petition of right to recover back the moneys so paid. Walton, J., held that the moneys having been paid under a mistake, not of fact, but of law, could not be recovered back either on the ground that they were paid under duress or compulsion or on the ground that they were paid in discharge of a demand illegally made under colour of an office. At page 745 he observes:

"The suppliants knew all the facts They had present to their minds plainly, when these payments were made, that there was a question as to whether upon such servants as those in question, duty was payable. They themselves raised that question and they paid the duties. They could have resisted payment. They must have known that if proceedings were taken for penalties, it would be open to them in such proceedings to raise the question as to whether the duties were payable or not as they did in fact in 1906. . . . . I think the most that took place was this, that the Officer

6. (1909) 101 L.T. 741.

of Inland Revenue told the suppliants that in his opinion and in the opinion of the Commissioners of Inland Revenue the duties were payable."

With regard to the cases of duress, the learned Judge observes after referring to certain passages in Leake on Contracts :

"In all those cases, in order to have that done which the person making the payment was entitled to have done without a payment, he had to make the payment and some one, who was bound to do something which the person paying the money desired to have done, refused to do his duty unless he was paid the money. If in those circumstances money was paid, then it can be recovered back. There is an element of duress."

The appellant made the return thinking that he was liable. Whatever might have been the state of the law before 21st February, 1922, after the decision in *Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[1] it could not be said that there was any doubt as to the non-liability of income from forests and fisheries arising out of permanently settled estates. The notice of assessment was on 31st March, 1922. The appellant could have preferred an objection to the assessment on the strength of *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*[1] and could have refused to pay the amount, even if he was unsuccessful in his representation to the Income-tax authorities that the income from forests and fisheries was not liable to be assessed under the Income-tax Act, and he chose to do none of these things but paid the amount on 21st April, 1922, *i.e.*, two months after the decision in *The Chief Commissioner of Income-tax* v. *Zamindar of Singampatti*.[1] In *Slater* v. *Mayor, etc., of Burnley*[2] the facts were: A water rate £8-15-4 for one quarter's rate in respect of certain houses was demanded by the defendants, the sanitary authority, and paid by the plaintiff, such sum being 5 per cent. on the gross rental of the houses. After this payment, the defendants altered their basis of assessment from gross rental to rateable value as the proper basis of assessment, they being entitled to charge 5 per cent. on the annual value. If the rate had been calculated on the rateable value it would have been £7-3-10. The plaintiff brought an action in a County Court to recover the overcharge of £1-11-6, the difference between the two sums, as being money paid under compulsion. There was no power to distrain for these rates (except when they did not exceed £1 a quarter which did not apply to the present case), but the defendants had the power to cut off the water-supply on non-payment of the rate. The County Court Judges held the payment to be a compulsory one,

1. (1922) I.L.R. 45 M. 518 (F.B.). 2. (1888) 59 L.T. 636.

Rajah of Ramnad v. Secretary of State for India.

as the defendants had the power to cut off water and gave judgment for the plaintiff. Cave and Wills, JJ., held that the payment was a voluntary payment and could not be recovered back. Cave, J., observed at page 639:

"There is no case which lays it down that a payment under these circumstances is a compulsory payment. If it were so the consequences would be very far-reaching. If that were so, no payment of rent to a landlord would be a voluntary payment."

Wills, J., observed:

"It seems to me, in these circumstances, that it is idle to say that there is anything like duress, there was nothing in the nature of a threat used; it is simply the ordinary case of a person raising a contention when a demand is made upon him. That is not sufficient to constitute duress so as to prevent a payment being a voluntary one."

The case would be different if for the purpose of getting an official act done a person pays something more than what is proper, for in order to get the act done he must pay the amount demanded otherwise the act would not be done. In such cases it can be said that the payment is not a voluntary payment, nor is it a payment made under a mistake of law. The case in *Hooper* v. *Mayor and Corporation of Exeter*[8] and the case in *Steele* v. *Williams*[9] are cases where, in order to get a certain thing done, the plaintiff had to pay the amount demanded. In *Hooper* v. *Mayor and Corporation of Exeter*[8] the Corporation of Exeter exacted harbour dues from the plaintiff in respect of exempted articles. The plaintiff paid in ignorance of the exemption. It was held that the plaintiff was entitled to recover back the money so paid. Lord Coleridge, C. J., observed at page 458:

"From the case cited in the course of the argument it is shown that the principle has been laid down that where one exacts money from another and it turns out that, although acquiesced in for years, such exaction is illegal, the money may be recovered as money had and received since such payment could not be considered as voluntary so as to preclude its recovery."

The plaintiff in this case could not have landed his limestone, the article exempted, without paying harbour dues. In *Steel* v. *Williams*[9] the facts were that the plaintiff's clerk applied to the defendant, a parish clerk, for liberty to search the register book of burials and baptisms. He told the defendant that he did not want certificates, but only to make extracts. The defendant said the charge would be the same whether

8. (1887) 56 L.J.Q.B. (N.S.) 457.
9. (1853) 8 Exch. 625: 155 E.R. 1502.

he made extracts or had certificates. The clerk searched through four years and made 25 extracts, for which the defendant charged him 3*s*. 6*d*. each and he accordingly paid the defendant £4-7-6. It was held first that the charge for extracts was illegal since 6 and 7 Will. IV. c. 86, S. 35 only authorises a charge for a search and for a certified copy and secondly that the payment was not voluntary so as to preclude the plaintiff from recovering back the excess. Parke, B., observed:

Rajah of Ramnad v. Secretary of State for India.

"In the first place I think that there is evidence that this payment was not voluntary but necessary for the exercise of a legal right, and further, I by no means pledge myself to say that the defendant would not have been guilty of extortion in insisting upon it, even without that species of duress, *viz*, the refusal to allow the party to exercise his legal right, but *colore officii*."

Martin, B., observed:

"It is the duty of a person to whom an Act of Parliament gives fees, to receive what is allowed and nothing more. This is more like the case of money paid without consideration—to call it a voluntary payment is an abuse of language."

In both these cases the plaintiff could not have got what he wanted without the payment, and therefore his payment could not be said to be voluntary, but a payment under duress. This point was the subject of decision by a Bench of this Court in a recent case. Ramesam and Jackson, JJ., held in C.R.P. No. 535 of 1926 as follows:

"The Indian Law seems to be clear, namely, that a mistake, in the sense that it is a pure mistake as to law in India, resulting in the payment by one person to another and making it inequitable that the payee should retain the money is no ground for relief."

They refer to an observation of Lord Sumner in *Sinclair* v. *Brougham*[10]. The learned Lord observes :

"There is now no ground left for suggesting as a recognizable 'equity' the right to recover money in *personam* merely because it would be the right and fair thing that it should be refunded to the payer."

We hold that the amount paid on 21st April, 1922 which is not barred under the three years' rule was made under a mistake of law and of the general law of British India, applicable to all persons in appellant's position holding permanently settled estates, and therefore cannot be recovered. In the result the appeal fails and is dismissed with costs.

The respondent has preferred a memorandum of objections against the order of the Subordinate Judge disallowing his costs.

10. (1914) A.C. 398 at 456.

Rajah of Ramnad v. Secretary of State for India.

Having regard to all the circumstances in which these payments were made we think that the plaintiff was rightly held not liable for the costs of the suit. The memorandum of objections is also dismissed.

N.S. *Appeal and Memo. of Objections dismissed.*

PRIVY COUNCIL.

[On appeal from the Chief Court of Oudh.]

PRESENT :—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Tewari Raghuraj Chandra and others .. *Appellants** (*Plffs.*)

v.

Rani Subhadra Kunwar and others .. *Respondents* (*Defts.*)

P. C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Oudh Estates Act of 1869, *S.* 22, *clause* (5) *as amended by Act III of* 1910—*"Brother"—Meaning of, as regards Hindu talukdar—If includes natural or blood brother, where talukdar himself an adopted son—Succession—Scheme of Act as regards—Personal law of talukdar not excluded from—"Son" in both Acts—If includes adopted son, when used simpliciter—S.* 22 *of Act—Construction—Rational and orderly construction—Adoption—Theory of Hindu Law as to—Natural brother of adopted son—Right of, to succeed to adopted son's estate in adoptive family.*

The word "brother" in clause (5) of S. 22 of the Oudh Estates Act of 1869, as amended by S. 14 of Act III of 1910, does not, in the case of a Hindu talukdar, who was himself the adopted son of the previous talukdar, include his natural brother.

Acts I of 1869 and III of 1910 are not designed to force one arbitrary and unnatural line of succession on all talukdars regardless of their family law, but are meant to be adapted to the circumstances of different classes of talukdars, except where an express deviation is made from the rules ordinarily applicable.

In construing the Acts of 1869 and of 1910, the personal law applicable is the personal law as it exists at the time when the question in the suit has to be decided.

S. 22 of the Act of 1869 must be read, so far as its language permits, so as to be rational and orderly, not so as to be arbitrary and capricious.

The word "son" used *simpliciter* means in the Act sons by natural generation and means nothing more.

It is not true to say that by Hindu Law an adoptee only loses his consanguinity for purposes of succession. Adoption has been spoken of as "new birth". Nor is the expression a mere figure of speech. The theory itself involves the principle "of a complete severance of the child adopted from the family in which he is born . . . and complete substitution into the adoptive family, as if he were born in it".

---

*P.C. Appeal No. 48 of 1927. 2nd February, 1928.

P. C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Appeal No. 48 of 1927 from a judgment and decree, dated the 22nd March, 1926, of the Chief Court of Oudh (Stuart, C. J., and Wazir Hasan, J.), which affirmed a judgment and decree, dated the 19th December, 1925, of the same Court in its Original Civil Jurisdiction (Ashworth, J.).

The sole question for determination on the appeal to His Majesty in Council was as to the meaning of the word 'brother' in clause (5), S. 22 of the Oudh Estates Act, 1869, as amended by the Oudh Estates (Amendment) Act III of 1910. The contention of the appellants was that it included the natural brother of a person adopted by a Hindu; both Courts in India held to the contrary. *See* 94 Indian Cases 294 and 95 Indian Cases 798, where the judgments of Ashworth, J., and of the learned Judges of the Court of Appeal (Stuart, C. J., and Wazir Hasan, J.), are fully reported.

Lowndes, K. C. and *Dube* for appellants.

De Gruyther, K. C., Moti Lal Nehru and *Hyam* for respondents.

2nd Feb. 1928. Their Lordships' judgment was delivered by

Viscount Sumner.

VISCOUNT SUMNER.—This appeal relates to the rules of succession laid down for certain Taluqdari estates in Oudh under Acts passed by the Legislative Council for the United Provinces, namely, Act I of 1869 (the Oudh Estates Act) and the amending Act III of 1910. The Chief Court of Oudh, affirming the decision of Ashworth, J., sitting on the original side of the same Court, decided in favour of the respondents as against the appellants' claims to a disputed succession to the Taluqa Sissendi.

Raja Chandra Shekhar, Taluqdar of Sissendi, died intestate on the 12th February, 1923, leaving a widow, the first of the present respondents, who subsequently obtained mutation of names of his properties and is in possession of them. Raja Kashi Prasad, a Hindu governed by Mitakshara Law, had been the Taluqdar when the earlier Act was passed, and his name was duly entered in respect of Sissendi in the Lists 1, 3 and 5, which were drawn up pursuant to S. 8 of the Oudh Estates Act, 1869.

In 1866 Raja Kashi Prasad, being childless, adopted Ram Krishna, the second son of his first cousin, Madho Prasad, then under five years old, and gave him the name of Chandra Shekhar. In 1873 he executed a registered non-testamentary document, in which he gave directions for the up-bringing of

P. C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Viscount Sumner.

the boy, and particularly laid stress on his complete separation from Madho Prasad and his descendants. He died on the 28th August, 1873, and Raja Chandra Shekhar succeeded him.

In the present suit the plaintiffs were members of the family of Madho Prasad, namely Krishna Narain, grandson of Ram Chandra, the eldest son of Madho Prasad, and two brothers of Ram Chandra, namely, the third and fourth sons of Madho Prasad. As primogeniture was the family rule of descent the appellant to whom the Taluqa would pass, if this appeal were to succeed, is Krishna Narain.

The appellants' contention is that on the death of Raja Chandra Shekhar the estate descended in default of male lineal descendants, of whom he had none, to the senior male lineal descendant of Ram Chandra, who was by birth the eldest natural brother of Raja Chandra Shekhar. This, it is said, is the effect of S. 22 (5) of the Oudh Estates Act, as amended by S. 14 of Act III of 1910.

The new S. 22, which that Act introduced into the Act of 1869 in lieu of the S. 22 originally enacted, is a list of persons, described in terms of their relationship, immediate or remote, to some predecessor, and set out in the order in which they will take the inheritance on the failure or in default of the persons previously described. It is not, like the original S. 22, confined to a list of described persons in the order of succession, but has provisos and explanations interpolated into it. The substance of both, however, is the same. For powers or obligations conferred by the Act over and above the general law applicable, one must look elsewhere.

In this sequence, the first three clauses describe "sons" and their lineal descendants, who take in the following order : (1) the eldest son of the original Taluqdar surviving his father; (2) his lineal descendant, in case he has predeceased his father; and (3) if he has died in his father's lifetime leaving no male lineal descendants, the younger sons of the original Taluqdar according to their respective seniorities. Failing all such persons, clause (4) brings in such person as the original Taluqdar shall have adopted and his lineal male descendants.

It is to be remarked here that, unlike Clause (5) in the original Act, which the present Clause (4) replaced, Clause (4) says nothing about the mode or circumstances of the adoption, but is generally applicable to any form of adoption. In the former Act, clause (5) simply introduced into the order of succession the Mahomedan adoptions, which by the subsequent

P. C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Viscount Sumner.

S. 29 were brought into existence in a statutory documentary form, without religious or other ceremonies. Clause (4) in the new Act brings into their place in the order of succession adoptions, both Mahomedan and Hindu, for the old S. 29 is amended and enlarged and all adoptions are now required to be completed by written documents subsequently registered. Thus the reference to persons adopted in the amended clause (4) is general and covers all adopted persons, the definition of the form, which makes them adopted persons, being now relegated to the altered S. 29, except that, in the case of adoption by a widow, a proviso is anomalously attached to Clause (7) of S. 22, prescribing the conditions to be observed by her, which would more regularly have formed a further addition to the altered Clause (29).

The result, however, of the alterations made by the Act of 1910 is that adopted sons, whether in Hindu families or otherwise, being now separately introduced into the succession, "sons" in Clauses 1, 2 and 3, do not include adopted sons, although a change in the general Hindu Law of succession results from the change in the Act. Under the Act of 1869, Hindu adopted sons came in either as sons under the first three clauses or under Clause 11, the latter being barely credible. Under that of 1910, all sons adopted by men come under Clause (4) and by widows under Clause (7). The resultant alterations in general Hindu Law are deliberate, and are considerable.

The appellants have thus made good the first step in their argument, namely, that "son" used *simpliciter*, means in this legislation sons by natural generation, and means nothing more. Their second step is that "brothers" likewise in Clause 5 means, or it is better to say includes, blood brothers. The Act, they say, is expressed in English; is its own dictionary; and, where its prescriptions are verbally clear, is not to be explained or be clouded by any implication from personal law. Is this construction made out?

There is here nothing corresponding to the sub-sections dealing with "sons" to show that the word "brothers" must have a limited meaning in Clause (5) as if brothers through adoption were, as adopted sons are, specifically dealt with, and the question in the present case is whether it can or cannot be predicated of, say, Ram Chandra, that he was a "brother" of Chandra Shekhar within the meaning of Clause (5). *Prima facie* he was, for the unqualified word "brother" would seem to include, at any rate, a brother by blood, though the context may introduce

P. C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Viscount Sumner.

some exception or limitation upon it. With "son" the question was whether the word included a son by adoption. With "brother," the question is whether the word may not be, in certain cases, determined not by the birth relationship, but by the adoptive relationship of the Taluqdar, the succession to whom is in question.

The Act, it is true, with its amending Act, applies to Taluqdars of different races and religions, Hindus, Mahomedans, Sikhs and Christians. It governs the succession not to property generally, but specifically to taluqdari estates. It lays down in S. 22 an order of succession, which is in form the same for all, but it uses words for the principal relationship, which have a different sense according as they are used of one community or another.

Words of relationship in connection with a law of inheritance differ in their signification and content, according as their context is an inheritance in one community or an inheritance in another. Legitimacy, adoption, and lawful wedlock, all of which involve legal conceptions, are terms which will vary in meaning according to the law of the community, with which in the given case the Act is concerned, and although to some extent the Act lays down express prescriptions on these subjects, this is not always so. Thus, "words expressing relationship denote only legitimate relatives," irrespective of natural relationship in blood. Adoption of a son is a right conferred by the legislation on Mahomedans, in a form involving a statutory procedure, to which are added the requirements, if any, imposed by the personal law of the adopter. Wife and widow, terms which are not defined or explained, involve, of course, the relevant laws of matrimony, under which they were duly espoused, and in S. 22 the words "brother" and "male agnate" apply only to *najib-ul-tarfain,* and the word "widow" only to a woman belonging to the *ahl-i-bradari* of her deceased husband. All these are matters of the personal law of the individual, to whom the succession is to be established, and the Act itself in some cases recognised the necessity for taking account of such personal law, as, for example, S. 13 (1) of the Act of 1869 (displaced, however, by the amending Act of 1910), where part of the limitations on a taluqdar's power of bequest is to be found in the ordinary law to which persons of the testator's tribe and religion are subject; S. 22, cl. (11), as amended in 1910, where the succession is given to "such person as would have been entitled to succeed to the estate under the ordinary

P.C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Viscount Sumner.

law to which persons of the religion and tribe of such taluqdar are subject," and S. 31, by which a taluqdar is allowed to make a formal declaration "that he is desirous that his estate should in future be held subject to the ordinary law of succession, to which members of his tribe or religion are subject."

These express references to the personal law of the taluqdar concerned cannot be read as exclusive of the implication of a reference to personal law where, as in the case of differing relationships described by the same word, the actual content of the word may vary according as the taluqdar belongs to one tribe, community or religion or another, and they serve to show that these Acts are not designed to force one arbitrary and unnatural line of succession on all taluqdars regardless of their family law, but are meant to be adapted to the circumstances of different classes of taluqdars, except where an express deviation is made from the rules ordinarily applicable.

It is also worthy of mention that under the amended S. 22, Clause (11), the cases of descent to a single person among persons (*i*) some of whom are connected by blood relationship and some by marriage, (*ii*) some of whom are related by the whole blood and some by the half blood, and (*iii*) some are related through males and some through females, are systematically provided for, but no mention is made of the case where the single person is one of several, who stand in the relation of brothers to the taluqdar, some by birth and some by adoption. Furthermore, under the head of maintenance of relations, S. 26 provides for allowances to brothers and minor sons of the deceased without any words to suggest that the estate is liable to persons outside the limits of the family in which the taluq is held, while by S. 20 the power of bequest to religious or charitable uses is restricted in words, which protect a brother and a nephew, who is the naturally born son of a brother, of the taluqdar, but, excluding as they do an adopted son of a brother, show an intention *pro tanto* to provide for family claims in preference to claims, which only arise in consequence of an adoption.

The last question is: "What in truth is the rule of Hindu Law—the personal law of Raja Chandra Shekhar—in its bearing on Krishna Narain's claim to inherit on his death as the senior direct descendant of Raja Chandra Shekhar's eldest-born brother?" It is contended that Hindu Law, properly understood, contains nothing which militates against the right of a born brother to be the brother, whose statutory right of succession is

P. C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Viscount Sumner.

provided for by S. 22 (5) of 1910. The matter, it is said, does not depend on the rights of succession, as a member of a new family by adoption, which Raja Chandra Shekhar might have had to properties belonging to other members of the house of Sissendi, but on the survival of the blood relationship for the legal purposes of Hindu Law between Raja Chandra Shekhar and his brothers born. Unless it can be said that in law the effect of the adoption of Raja Chandra Shekhar was to make Ram Chandra no longer his brother, then by the explicit words of the enactment, Ram Chandra's lineal descendant and no other was next in succession to him.

It is quite true that for certain purposes the blood relationship of an adopted Hindu remains real and binding after the adoption. For example, his born sister is within the prohibited degrees of affinity. It is true also that authoritative texts of the writings, in which the Mitakshara law was originally expressed, dwell on the matter of inheritance and succession in connection with adoption in a way that leaves some of the consequences of adoption unexpressed. They define the rights of the person adopted as a member of his adoptive family, but they do not in terms complete the matter by prescribing his entire expulsion from his original family and the severance of his born brothers from him and from the name of brother for all purposes connected with succession to property. Hindu Law, however, has not stood still. Those texts have been elucidated and applied since 1869 in a great number of decisions which have authoritatively settled the law, and in construing the Acts the personal law applicable, when once it is held that the Acts imply the application of personal law, is the personal law as it exists at the time when the question in the suit has to be decided.

It is not true to say that by Hindu Law an adoptee only loses his consanguinity for purposes of succession. Adoption has been spoken of as "new birth" in many cases, a term sanctioned by the theory of Hindu Law. Nor is the expression a mere figure of speech. The theory itself involves the principle "of a complete severance of the child adopted from the family in which he is born . . . . and complete substitution into the adoptive family, as if he were born in it" (*Nagindas Bhugwandas* v. *Bachoo Hurkissondas*[1]). "The fundamental idea is that the boy given in adoption gives up the natural family and everything connected with the family" (*Dattatraya Sakharam* v.

1. (1915) L.R. 43 I.A. 56 at 68 : I.L.R. 40 Bom. 270 : 30 M.L.J. 193 (P.C.).

P. C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Viscount Sumner.

Govind Sambhaji[2]). As has been more than once observed, the expressions "civilly dead or as if he had never been born in the family" are not for all purposes correct or logically applicable, but they are complementary to the term "new birth." It is not merely the ceremonies for the natural father, who has given, or for the adoptive father, who has taken, a son in adoption that are involved, but those for the ritual number of ancestors in each case. "Let no man give or accept an only son, since he must remain to raise up a progeny for the obsequies of ancestors. He who means to adopt a son, . . . may receive as his son by adoption, even one remotely related . . . The class ought to be known, for through one son the adopter rescues many ancestors" (Vasishtha, cited in Mayne's "Hindu Law," para. 107). Consideration of the intimate connection, which primitive Hindu Laws established between the funeral offerings and ceremonies on behalf of the dead and the right of succession to his property, will show that ceremonially the adopted son only becomes new-born in the family of his adoptive father, so as to be qualified to provide efficaciously the offerings of which the dead have need, by first dying in the family of his birth, out of which he is given by his natural to his adoptive parent, and in which his offerings will be no longer efficacious or desired. If such a person's natural brother were to be made the heir to the taluq, how could he, still a member of the family of his birth and bound to make the necessary offerings for his own ancestors, be qualified to do the same thing for his brother and his adoptive father and that father's immediate predecessors? If he cannot, how is the legal theory squared with the termination of the ceremonies in the family into which the son was adopted? Their Lordships think that these considerations are conclusive.

They would add that the argument demands a construction, which it is wholly unreasonable to put upon the word "brother," having regard to the scheme and subject-matter of the legislation itself. The object was to provide a fixed canon of succession, applicable indefinitely *in futuro,* and applicable also to families of different races, tribes and religions. The Act of 1869 was the result of discussions and negotiations, which took place at Calcutta in 1868, the parties to which in general terms are known (*Pertab Narain Singh* v. *Subhao Kooer*[3]). For what reasons this particular sequence of successions was adopted their Lord-

2. (1916) I.L.R. 40 Bom. 429 at 435.

3. (1877) L.R. 4 I.A. 228 at 238: I.L.R. 3 Cal. 626 (P.C.).

P. C.

Tewari Raghuraj Chandra v. Rani Subhadra Kunwar.

Viscount Sumner.

ships do not affect to know, but this at least is clear, that it was done on some definite view of sound and consistent policy. Hindu Law, it is true, is in not a few instances deliberately departed from, but there could be no rational object in devising a mongrel rule of succession and construing it exclusively in the sense of the English terms used in expressing it. The section must be read, so far as its language permits, so as to be rational and orderly, not so as to be arbitrary and capricious. The appellants' interpretation would make the provision cut across the recognised principles of Hindu Law on the subject without approximating to the law of any other community; would exclude some persons by mere chance without in any way securing proprietors more competent or loyal than those, whom the regular law of succession would bring in, and would produce confusion instead of order and discontent instead of satisfaction.

Their Lordships will accordingly humbly advise His Majesty that this appeal ought to be dismissed with costs.

Solicitors for appellants : *T. L. Wilson & Co.*

Solicitors for respondents : *Barrow, Rogers & Nevill.*

K. J. R. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Allahabad.]

PRESENT:—THE LORD CHANCELLOR, VISCOUNT HALDANE, LORD ATKIN, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

Kishan Singh .. *Appellant**

v.

The King-Emperor .. *Respondent.*

P. C.

Kishan Singh v. The King-Emperor.

Criminal Procedure Code (V of 1898), S. 439 (4)—Applicability—Acquittal—Finding of—Alteration into one of conviction—Revision—Jurisdiction of High Court in—Sub-section not confined to cases of complete acquittal.

In a case in which the appellant was acquitted of the charge of murder, and convicted of the offence punishable under S. 304, Indian Penal Code, by the Sessions Judge, the Local Government preferred a revision to the High Court, praying that the appellant might be convicted of the offence of murder under S. 302, Indian Penal Code, though the Local Government could, under S. 417, Criminal Procedure Code, have appealed against the acquittal. The High Court in revision altered the conviction into one under S. 302, Indian Penal Code.

---

*P.C. Appeal No. 49 of 1928. 2nd July, 1928.

P. C.

Kishan Singh v. The King-Emperor.

Held, that in view of sub-section (4) of S. 439, Criminal Procedure Code, the High Court had no jurisdiction in revision to convert the trial Judge's finding of acquittal on the charge of murder into one of conviction of murder.

S. 439, sub-section (4) is not confined to cases where the trial has ended in a complete acquittal of the accused in respect of all charges or offences. It applies to a case where the accused has been acquitted of a major offence, though convicted of a minor offence.

Re Bali Reddi, (1913) I.L.R. 37 Mad. 119 disapproved in so far as it was intended to lay down a different rule.

Appeal No. 49 of 1928 by special leave from a judgment and order of the High Court, Allahabad (Walsh and Kendall, JJ.), dated the 31st October, 1927, which, on an application for revision by the Local Government, convicted the appellant of an offence punishable under S. 302 of the Indian Penal Code (murder) and sentenced him to death.

Wallach for appellant.

Dunne, K. C. and *K. Brown* for respondent.

2nd July, 1928. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

Sir Lancelot Sanderson.—By His Majesty's Order in Council, dated the 22nd of March, 1928, special leave to appeal against a judgment of the High Court of Judicature at Allahabad, dated the 31st of October, 1927, was granted to the appellant.

On the 18th June, 1927, the appellant, Kishan Singh, was charged by a Magistrate of the First Class as follows:—

"That you on or about the 20th day of March, 1927, at Bharthwa did commit murder by intentionally causing the death of Kuber Singh and Shoran Singh and thereby committed an offence punishable under S. 302 of the Indian Penal Code, and within the cognizance of the Court of Session.

And I hereby direct that you be tried by the said court on the said charge."

He was tried on the said charge by the Additional Sessions Judge of Aligarh, with the aid of four assessors, and on the 31st of July, 1927, the learned Judge delivered his judgment. He recited the finding of the assessors as follows:—

"All the assessors are unanimously of the opinion that the accused was guilty under section 304, Indian Penal Code, and in their opinion the story about the *rath* was a false one and the accused had shot down Kuber Singh as he had seen him cohabiting with his own wife. They were also of opinion that both Shoran Singh and Kuber Singh were shot by Kishan Singh with his gun and the *gandasa* story was a got-up one and the *gandasa* was never used by the accused in order to kill Shoran Singh. They were also of the opinion that in the struggle which ensued between Kishan Singh and Shoran Singh the gun went off and shot Shoran Singh."

P. C.

Kishan Singh v. The King-Emperor.

Sir Lancelot Sanderson.

The learned Judge concluded his judgment by saying :

"Agreeing with all the assessors I find the accused guilty under S 304, Indian Penal Code, for committing both the said murders. I sentence him to three years' rigorous imprisonment for the murder of Kuber Singh under S. 304, Indian Penal Code, and I sentence him to five years' rigorous imprisonment for the murder of Shoran Singh with his gun under S 304, Indian Penal Code; both the sentences to run concurrently"

Although the learned Judge in the above-mentioned part of his judgment spoke of the "murder of Kuber Singh" and "the murder of Shoran Singh," it is clear that the sentence was passed under S. 304 of the Indian Penal Code. That section deals with culpable homicide not amounting to murder, and it must therefore be taken for the purposes of this appeal that the offence of which the appellant was found guilty by the learned Judge was culpable homicide not amounting to murder.

The charge, as already stated, was that the appellant had committed an offence punishable under S. 302 of the Indian Penal Code, viz., murder.

It is, however, provided by S. 238 (2) of the Code of Criminal Procedure that when a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

It was, therefore, legitimate for the learned Judge to convict the appellant of the offence punishable under S. 304 of the Indian Penal Code, viz., culpable homicide not amounting to murder, although there was no charge in respect of that offence framed against the appellant.

The learned Judge did not record an express finding of acquittal in respect of the charge of murder, but their Lordships are of opinion that the conclusion at which the learned Judge arrived amounted to an acquittal in respect of that charge.

The only charge framed against the appellant was one of murder; he certainly was not convicted of murder. On the contrary, he was found guilty of culpable homicide not amounting to murder.

The appeal, therefore, must be decided upon the assumption that the appellant was acquitted of the charge of murder, and that he was convicted of the offence punishable under S. 304 of the Indian Penal Code.

On the 23rd of September, 1927, the Government advocate, on behalf of the Local Government, filed an application for

P. C.

Kishan Singh v. The King-Emperor.

Sir Lancelot Sanderson.

revision of the judgment of the learned Additional Sessions Judge of Aligarh.

The grounds of the application were as follows:—

1. That on the evidence the accused should have been convicted under S. 302, Indian Penal Code.

2. That the sentence passed on the accused is inadequate.

The application concluded as follows:—

"It is therefore prayed that the conviction be allowed and the sentence passed on the accused be enhanced."

The learned counsel, who appeared for the respondent, argued that the word "altered" should be read instead of the word "allowed," whereas the learned counsel for the appellant suggested that the word "revision" should be read instead of the word "conviction."

It is not necessary to consider this matter further, for their Lordships are of opinion that, having regard to the terms of the first ground, there is no doubt but that the main object of the application for revision was to obtain a conviction of the accused in respect of the offence punishable under S. 302 of the Indian Penal Code, viz., murder.

The application for revision was decided by the High Court of Judicature at Allahabad on the 31st of October, 1927.

The learned Judges, having considered the evidence, came to the conclusion that there had been a miscarriage of justice in the trial court. They accepted the application and directed that the conviction of the appellant, Kishan Singh, should be altered to a conviction under S. 302 of the Indian Penal Code, and they sentenced him to death.

The main argument on which the learned counsel for the appellant relied was that the appellant had been acquitted by the Trial Judge of the charge of murder, that the Local Government had not appealed from the acquittal of the appellant in respect of that charge, as they might have done under S. 417 of the Code of Criminal Procedure, 1898, that inasmuch as the Local Government had not appealed against the said acquittal, the learned Judges of the High Court should not have entertained the application for revision at the instance of the Local Government, and that in any event, even if it was open to the High Court to entertain the application for the purpose of enhancing the sentence in respect of the offence punishable under S. 304 of the Indian Penal Code, of which the appellant had been

P. C.

Kishan Singh v. The King-Emperor.

Sir Lancelot Sanderson.

convicted, the learned Judges had no jurisdiction to convert the finding of acquittal on the charge of murder into one of conviction.

As already stated, their Lordships are of opinion that the appellant was acquitted by the learned Judge who tried the case, in respect of the charge of murder.

They are further of opinion that the Local Government could have appealed to the High Court against that acquittal in pursuance of the provisions of S. 417 of the Code of Criminal Procedure.

It is clear that the Local Government did not appeal against the acquittal.

The procedure adopted by the Local Government was to present an application for revision.

The sections of the Code of Criminal Procedure, which are material to the application for revision, are 435 (1) and 439 (1), (4) and (5).

Section 435 (1) relates to the power to call for records of inferior courts and is as follows:—

"435 (1) The High Court or any Sessions Judge or District Magistrate or any Sub-divisional Magistrate empowered by the Local Government in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record."

Section 439 relates to the High Court's powers of revision and sub-sections (1), (4) and (5) are as follows:—

"439. (1) In the case of any proceeding the record of which has been called for by itself or which has been reported for orders, or which otherwise comes to its knowledge, the High Court, may, in its discretion, exercise any of the powers conferred on a Court of Appeal by sections 423, 426, 427 and 428 or on a Court by section 338, and may enhance the sentence; and when the Judges composing the Court of Revision are equally divided in opinion, the case shall be disposed of in manner provided by section 429.

(4) Nothing in this section applies to an entry made under S. 273, or shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction.

(5) Where, under this Code, an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed."

P. C.
Kishan Singh v. The King-Emperor.
Sir Lancelot Sanderson.

Their Lordships are of opinion that in view of the provision contained in S. 439, sub-section (4)—that nothing in that section shall be deemed to authorise a High Court to convert a finding of acquittal into one of conviction—the learned Judges of the High Court, who were dealing only with the application for revision, had no jurisdiction to convert the learned Trial Judge's finding of acquittal on the charge of murder into one of conviction of murder.

Their Lordships' attention was drawn to a decision of the Madras High Court in *Re K. Bali Reddi and others*[1] in which, amongst other matters, it was decided that S. 439, sub-section (4), must be construed as referring to cases where the trial has ended in a complete acquittal.

The reason of that decision was that any other construction would be inconsistent with the power to "alter the finding" given to the Court as a Court of Revision by virtue of its power to exercise the powers conferred on a Court of Appeal by section 423 (*b*).

It should be noted that the facts of the cited case are different from the facts of the present case, inasmuch as in the Madras case the accused had appealed to the High Court against their conviction under Ss. 147 and 304 of the Indian Penal Code, and the High Court, as a Court of Revision, had given them notice to show cause why they should not be convicted of murder and be sentenced for that offence.

It is not necessary on the present occasion for their Lordships to express any opinion whether the facts of the cited case would justify the decision at which the learned Judges arrived. Their Lordships, however, do think it necessary to say that if the learned Judges of the High Court of Madras intended to hold that the prohibition in S. 439, sub-section (4) refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all charges or offences, and not to a case such as the present, where the accused has been acquitted of the charge of murder, but convicted of the minor offence of culpable homicide not amounting to murder, their Lordships are unable to agree with that part of their decision. The words of the sub-section are clear and there can be no doubt as to their meaning. There is no justification for the qualification which the learned Judges in the cited case attached to the sub-section.

1. (1913) I.L.R. 37 M. 119.

P. C.

Kishan Singh v. The King-Emperor.

Sir Lancelot Sanderson.

The High Court of Allahabad, in the case of *The Emperor* v. *Sheodarshan Singh*[2] and the High Court of Bombay in the case of *The Emperor* v. *Shivputraya Durdundaya*[3] dealing with the provisions of S. 439 (4), arrived at a conclusion contrary to that of the Madras High Court in the case hereinbefore cited.

The head-note of the Allahabad case is as follows:—

"An accused person was charged with both murder and culpable homicide not amounting to murder. He was acquitted on the former charge and convicted on the latter. On a perusal of the sessions statement, notice was sent to the accused to show cause why he should not be convicted of murder and punished accordingly.

"*Held*, on return of the notice, that the High Court had no power, except through the medium of an appeal on behalf of the Local Government, to convert the acquittal into a conviction."

The learned Judges in giving judgment said as follows:—

"We cannot, however, change the conviction into a conviction for murder Sheodarshan Singh was acquitted by the Sessions Judge of the offence of murder and we cannot in revision convert a finding of acquittal into one of conviction. The only method by which it would be possible to obtain a conviction of murder would be by an appeal by the Government against the acquittal."

Their Lordships are of opinion that the above is a correct statement of law; it is indeed no more than a repetition of the provisions of the material sections of the Code of Criminal Procedure.

It was contended further by the learned counsel for the respondent that it was open to the High Court to entertain the application for revision at all events so far as it was an application that the sentence passed upon the appellant in respect of the offence, of which he had been convicted, should be enhanced; and he asked their Lordships to remit the case to the High Court of Allahabad in order that the application that the sentence in respect of the offence under S. 304, Indian Penal Code, should be enhanced, might be heard and disposed of.

Their Lordships do not express any opinion on the facts of this case, or upon the decisions arrived at by the two Courts in India in respect thereof, or upon the adequacy of the sentence passed upon the appellant by the learned Judge who tried the case.

In the circumstances of this case, however, their Lordships have come to the conclusion that it would not be right to remit

2. (1922) I.L.R. 44 All. 332.
3. (1924) I.L.R. 48 Bom. 510.

P. C.
Kishan Singh
v.
The King-Emperor.
Sir Lancelot Sanderson

it to the High Court for further consideration solely upon the question whether the sentence in respect of the offence, of which the appellant was convicted, should be enhanced.

Finally, it was urged by the learned counsel on behalf of the respondent that even though the learned Judges of the High Court had no jurisdiction on the application for revision to convert the order of acquittal on the charge of murder into one of conviction, there had been no injustice done to the appellant, for the Local Government could have appealed to the High Court against the acquittal, that the time for appealing had not expired, and that the High Court upon such appeal would have had before it the same materials as were before the Court on the application for revision, and the appellant could and would have been convicted of murder.

Their Lordships cannot accept that argument.

They are of opinion that the learned Judges of the High Court in converting the finding of acquittal of the appellant on the charge of murder into one of conviction, and in sentencing him to death on the application for revision, were acting without jurisdiction, and in such circumstances it is impossible to hold that no injustice was done.

Their Lordships are of opinion that this case comes within the exception to the rule stated in the judgment of Lord Watson in *In re Dilet.*[4]

This appeal, therefore, should be allowed, the judgment and order of the High Court should be set aside, and the judgment and order of the learned Additional Sessions Judge should be restored, and their Lordships will humbly advise His Majesty accordingly.

Solicitor for appellant : *H. S. L. Polak.*

Solicitor for respondent : *Solicitor, India Office.*

K. J. R. *Appeal allowed.*

---

4 (1887) 12 App. Cas. 459 at 467.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE PAKENHAM WALSH.

Veerappa Chettiar .. *Appellant* (Plaintiff)*

v.

Subrahmania Aiyar and others .. *Respondents (Defts.).*

F. B. — Veerappa Chettiar v. Subrahmania Aiyar.

Transfer of Property (Amendment) Acts of 1926 and 1927—Restrospective.—Signatures of Registering Officer and of identifying witnesses affixed to registration endorsement—If sufficient attestation within meaning of Transfer of Property Act and of amending Acts.

Held by the Full Bench—The Transfer of Property (Amendment) Acts XXVII of 1926, X of 1927 and XII of 1927 are retrospective.

The signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement under Ss. 58 and 59 of the Indian Registration Act amount to sufficient attestation within the meaning of S. 59 of the Transfer of Property Act and its subsequent amending Acts.

Appeal against the decree of the Court of the Subordinate Judge of Negapatam, dated 19th November, 1923, in O.S. No. 14 of 1921.

T. V. Venkatarama Aiyar for *T. V. Ramanatha Aiyar* for appellant.

T. V. Muthukrishna Aiyar for *N. Muthuswami Aiyar, T. S. Subramania Aiyar* and *T. S. Srinivasan* for respondents.

The Court (The Chief Justice and Srinivasa Aiyangar, J.) made the following

ORDER.—Before determining the various questions of law that have been argued in this appeal it seems to us that it is necessary that findings should be recorded and sent up by the Lower Court with regard to the following matters:—

1. Whether the Sub-Registrar who registered the instrument, Exhibit A in the case, made his signature in the registration endorsement referring to the admission of execution by the executants of the document in the presence of the executants?

2. Whether the witnesses who identified the executants before the Sub-Registrar were present when such admission of execution was made by the executants?

3. Whether they or either of them made their signature in the presence of the executants?

Time for return of the findings is two months.

---

*Appeal No. 235 of 1924. 4th September, 1928.

F. B.

Veerappa Chettiar v. Subrahmania Aiyar.

Ten days are allowed for objections.

In compliance with the above order, the Subordinate Judge of Negapatam submitted the following findings:—

1. "that the Sub-Registrar who registered Exhibit A made his signature in the registration endorsement referring to the admission of execution by the executants of the document in the presence of the executants."

2. "that the witnesses who identified the executants of Exhibit A before the Sub-Registrar were present when the admission of execution of that document was made by the executants."

3. "that both the identifying witnesses made their signatures in the presence of the executants of Exhibit A."

After the receipt of the findings the Court (the Chief Justice and Odgers, J.) made the following

Coutts Trotter, C. J.

ORDER OF REFERENCE TO A FULL BENCH.—*Sir Murray Coutts Trotter, Kt.*—This appeal was argued before Mr. Justice Srinivasa Aiyangar and myself and we asked for findings on three points. The findings have come to hand, but it is pointed out by the learned vakils in the case that a point of law confronts us *in limine*, the disposal of which might affect the appeal so as to render discussion of any subsidiary points unnecessary. The points are of considerable importance and relate to the position of a Registration Officer as a witness to a document which comes before him in his official capacity and to which he affixes his signature. There is direct authority in Patna for the position taken up by the appellant, the case of *Sarada Prasad Tej* v. *Triguna Charan Ray*[1]. The decision in that case has been gravely doubted by Mr. Justice Carr in *S. M. A. R. A. L. Firm* v. *R. M. M. A. Firm*[2]. The opinion of the Patna High Court is also supported in *Radha Mohan Dutta* v. *Nripendra Nath Nandy*[3]. The question is one of importance and is likely to arise constantly, especially since the definition of "attestation" in the amending Act. It is one that is very likely to recur and one of the questions that will arise will be as to the effect of the amending Acts with their new definition of "attestation" which did not exist in the old Transfer of Property Act. In these circumstances, we think it best to refer the following questions to a Full Bench:—

1. Whether Acts XXVII of 1926, X of 1927 and XII of 1927 are retrospective in their nature so as to apply to documents executed on a date prior to their coming into force?

2. Whether the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorse-

---

1. (1922) I.L.R. 1 Pat. 300. 2. (1927) I.L.R. 5 Rang. 772.
3. (1927) 47 C.L.J. 118.

F. B.

Veerappa Chettiar v. Subrahmania Ayyar.

Coutts Trotter, C. J.

ment under Ss. 58 and 59 of the Indian Registration Act amount to sufficient attestation within the meaning of S. 59 of the Transfer of Property Act read with the aforesaid amending Acts?

3. Consequently, whether or no Appeal No. 170 of 1925* was rightly decided?

T. V. Venkatarama Aiyar (with him *T. V. Ramanatha Aiyar*) for appellant.—In this case a mortgage deed dated 23rd April, 1914, was attested by one attestor alone. Execution was admitted before the Sub-Registrar and there were two identifying witnesses before the Sub-Registrar. The question is whether the deed is validly executed. The Transfer of Property (Amending) Act XXVII of 1926 is retrospective. The definition of attestation is borrowed from the definition of attestation under the Indian Succession Act and therefore rulings under the latter Act are applicable to cases under the Transfer of Property Act. Act XXVII of 1926 is declaratory and is retrospective. In *Girja Nandan Kalwar* v. *Hanuman Das*[4] two of the five Judges held it was retrospective. The case which necessitated the reference is the case in *Palaniappa Chettiar* v. *Rajagopala Pandarathan*[5]. That held that the Act was not retrospective. Reliance was placed in that case on Act X of 1927, but Ss. 3 and 4 of Act X of 1927 were repealed by Act XII of 1927. All the other High Courts hold that Act XXVII of 1926 is retrospective. *Yacub Khan* v. *Guljar Khan*[6], *S.M.A.R.A L. Firm* v. *R.M.M.A. Firm*[2] and *Radha Mohan Dutta* v. *Nripendra Nath Nandy*[3].

T. V. Muthukrishna Aiyar (with him *N. Muthuswami Aiyar*) for respondents.—*Palaniappa Chettiar* v. *Rajagopala Pandarathar*[5] is a correct ruling. Only the Calcutta High Court holds that the Signature of the Registrar is sufficient attestation. For a valid mortgage registration and attestation by two witnesses are essential. The witnesses should attest as witnesses of the execution of the document. They must either see or receive an acknowledgment of the execution. The Registrar signs not as witness or attestor, but in discharge of a statutory obligation cast on him by the Registration Act for the purpose of registering documents.

---

*Case reported in, (1928) M.W.N. 425, *Palaniappa Chettiar* v *Rajagopala Pandarathan*.

2. (1927) I.L.R. 5 Rang. 772. 3. (1927) 47 C.L.J. 118.
4. (1926) I.L.R. 49 A. 25 (F.B.)
5. A.S. No. 170 of 1925 : (1928) M.W.N. 425 : 111 I.C. 407.
6. (1927) I.L.R. 52 B. 219.

F. B.

Veerappa Chettiar v. Subrahmania Aiyar.

[*Chief Justice.*—But the Registrar by his signature vouches that the signature is that of the person whose it purports to be, notwithstanding that he does so under the Registration Act.]

I submit it is not sufficient attestation. I rely on *Sarkar Barnard & Co.* v. *Alak Monjary Kuari*[1].

[*Chief Justice.*—That case is entirely different. There the husband signed to express his consent of the wife's action and not to attest or vouch the signature of his wife.]

I submit that case governs the present case also and I contend that there is no valid attestation.

T. S. Subramania Aiyar and *T. S. Srinivasa Aiyar* for 8th respondent.

The Court expressed the following

Coutts Trotter, C. J.

OPINION:—*Sir Murray Coutts Trotter, Kt.*—My brother Odgers and I referred this case to a Full Bench rather from a desire to have an authoritative ruling for the Courts of this Presidency than from any real doubt we had as to the right answers to the questions that we referred.

The answers to the questions are as follows:—

(1) The Acts are retrospective. We should have thought that Acts XXVII of 1926 and X of 1927 showed a clear intention that they were to be regarded as retrospective, but the terms of Act XII of 1927 preclude further discussion.

(2) The signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement are a sufficient attestation within the meaning of the Transfer of Property Act and its subsequent amending Acts. The argument against this conclusion was that the signatures were made *alio intuitu*, to satisfy the requirements of the Registration Act, and cannot therefore be invoked in aid for another purpose, viz., attestation under the Transfer of Property Act though in fact all the conditions laid down by the latter Act are fulfilled. The Registering Officer and the identifying witnesses had exactly the same duty imposed upon them by the Registration Act as would have vested upon them as attesting witnesses under the Transfer of Property Act, and that duty they discharged. We think that this argument is at its best too artificial to prevail, and we agree with *Sarada Prasad Tej* v. *Triguna Charan Ray*[1] and *Radha Mohan Dutta* v. *Nripendra Nath Nandy*[2] in rejecting it.

1. (1922) I.L.R. 1 Pat. 300. 3 (1927) 47 C.L.J. 118.
7. (1924) 26 Bom. L.R. 737 (P.C.).

F. B.
Veerappa Chettiar
v.
Subrahmania Aiyar.

(3) As Appeal No. 170 of 1925 has not been reported, it is unnecessary to express any opinion on the correctness of the decision.

Ramesam, J.—I agree.

Pakenham Walsh, J.—I agree.

N.S. *Reference answered.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS, MR. JUSTICE ODGERS AND MR. JUSTICE VENKATASUBBA RAO.

Ippili Raghunadha Patro and others .. *Petitioners**

v.

Govinda Patro (dead) and others .. *Respondents.*

F. B.
Raghunadha Patro
v.
Govinda Patro.

Madras Estates Land Act (I of 1908), Ch XI and S. 205—Orders passed by the Board of Revenue—Power of High Court to revise—Civil Procedure Code, S. 115—Government of India Act, S. 107.

Per *Phillips and Odgers, JJ* (*Venkatasubba Rao, J,* dissenting). The High Court has no power, in the exercise of its revisional jurisdiction either under section 115 of the Civil Procedure Code or under S. 107 of the Government of India Act of 1919, to revise orders passed by the Board of Revenue under Ch. XI or S. 205 of the Madras Estates Land Act.

Valluri Narasimha Rao v. *The Ryots of Peddamamidipalli,* (1925) I.L.R. 49 Mad. 499 : (1926) M.W.N. 131 overruled.

Petitions under section 115 of Act V of 1908 praying the High Court to revise the order of the Board of Revenue, Land Revenue, Madras, dated 9th February, 1924, and passed in R.P. Nos. 5 and 6 of 1923 (Nos. A-1, 1899 and 1900 of 1922, District Collector, Ganjam, M.Ps. Nos. 179 and 180 of 1920, Sub-Collector, Berhampore) and

Petition under section 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Board of Revenue, Land Revenue and Settlement, Madras, dated 17th October, 1924, and passed in R.P. No.——of 1924 preferred against the order of the Court of the Revenue Divisional Officer, Chatrapur, in M.P. No. 24 of 1922.

C. Sambasiva Rao for petitioners.

The Government Pleader on behalf of the Government.

B. Jagannadha Doss for respondents.

---

*C.R.P. Nos. 1027 and 1028 of 1924 and 301 of 1925. 12th April, 1928.

The Court (Kumaraswami Sastri and Wallace, JJ.) made the following

F. B.

Raghunadha Patro v. Govinda Patro.

ORDER OF REFERENCE TO A FULL BENCH.—These petitions raise the question whether the Board of Revenue acting under Chapter XI or section 205 of the Estates Land Act is subordinate to the High Court so as to enable the High Court to revise proceedings passed by the Board. There has been a conflict of opinion with regard to this question.

In *Ramaswami Naicker* v. *Subbarayalu Naicker*,[1] though the question did not arise directly for determination, Sadasiva Aiyar and Moore, JJ., observed that the question was not free from doubt and that it would be difficult to hold that the Board of Revenue is a Court subordinate to the High Court or subject to the appellate jurisdiction of the High Court. In *Appanna* v. *Latchayya*[2] the question arose as to whether an order of the Board of Revenue dismissing an appeal under section 171 of the Estates Land Act was subject to revision by the High Court. Spencer, J., was of opinion that the High Court had no such power. Devadoss, J., was of opinion that the High Court had power to revise judicial orders passed. In *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[3] the question arose as to whether the High Court had revisional jurisdiction in proceedings under Chapter XI of the Madras Estates Land Act over orders passed by the Board of Revenue in appeal under section 171 of the Act, and Devadoss and Waller, JJ., held that the High Court had revisional jurisdiction. In *Valluri Narasihma Rao* v. *The Ryots of Peddamamidipatti*[3] it was held that the High Court had power to revise orders passed by the Board of Revenue under Ss. 171 and 172 on the ground that all Courts governed by the Civil Procedure Code were subject to the revisional jurisdiction of the High Court. In *Maharajah of Jeypore* v. *Sobha Sundar Dalai*[4] Ramesam, J., was of opinion that the order of a revenue official under section 111 of the Estates Land Act is subject to the revisional powers of the High Court on the ground that the fact that the order may be questioned by a suit is sufficient to make the order revisable by the High Court. In *Zamindar of Kallikote* v. *Mongolopur*[5] the question came up for decision before a Full Bench, but as the learned Judges decided the case on another point, no opinion was expresesd on this

1. (1916) 3 L.W. 158.
2. (1923) I.L.R. 47 M. 250: 45 M.L.J. 735.
3. (1925) I.L.R. 49 M. 499 : (1926) M.W.N. 131.
4. (1925) 49 M.L.J. 540. 5. (1926) 51 M.L.J. 500 (F.B.).

F. B.
—
Raghunadha Patro v. Govinda Patro.

question. In *Paramaswami Aiyangar* v. *Natchiar Ammal*[6] it was held by Ayling and Krishnan, JJ., that the High Court had power to revise an order passed by a Deputy Collector as to who was the proper legal representative to be brought on record in a rent suit. In *Ramaswami Goundan* v. *Kali Goundan*[7] the same learned Judges held that the High Court had power to revise the order of a Collector setting aside a sale without notice.

We think that having regard to the divergence of opinion and to the importance of the question it is desirable that the law on this point should be settled by the decision of a Full Bench and we refer the following question for determination:—

"Has the High Court in the exercise of its revisional jurisdiction either under S. 115 of the Civil Procedure Code or section 107 of the Government of India Act of 1919 power to revise orders passed by the Board of Revenue under Chapter XI or section 205 of the Estates Land Act"

C. Sambasiva Rao and *A. Krishnaswami Aiyar* for petitioners.

The Government Pleader on behalf of the Government.

T. R. Venkatarama Sastriar for *B. Jagannadha Doss* for respondents.

The Court expressed the following

Phillips, J.

OPINION. *Phillips, J.*—The question that has been referred to us is as follows:—

'Has the High Court in the exercise of its revisional jurisdiction either under section 115 of the Civil Procedure Code or section 107 of the Government of India Act of 1919 power to revise orders passed by the Board of Revenue under Chapter XI or section 205 of the Estates Land Act?"

It is admitted that the petitions in which this reference has been made relate only to section 205 of the Estates Land Act and not to Chapter XI of the same. So far, therefore, as orders passed under the latter are concerned, the question is one of academic importance but it will probably be necessary to deal with it in considering the other portion of the reference. Although this reference deals only with orders passed by the Board of Revenue under the Estates Land Act, a great deal of the argument has been directed to the power of revision passed by the High Court in proceedings generally under the Act, for it is only in three reported cases of this Court that the question of revising an order of the Board of Revenue has arisen, namely, *Appanna*

6. (1918) I.L.R. 42 M. 76 : 35 M.L.J. 632
7. (1918) I.L.R. 42 M. 310 : 36 M.L.J. 571.

F. B.
Raghunadba Patro v. Govindo Patro.
Phillips, J.

v. *Latchayya*,[2] where the learned Judges differed in opinion, *Zamindar of Kallikote* v. *Mongolopur*[3] where the Full Bench held that the question need not be decided in those proceedings, and *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*,[5] where Devadoss and Waller, JJ., held that the High Court had such jurisdiction. It is sought to establish the jurisdiction of this Court on two grounds, (1) the powers of the Court under section 107 of the Government of India Act and section 16 of the Letters Patent, and (2) the powers under section 115 of the Civil Procedure Code. So far as proceedings before a Collector are concerned, it was held in *Paramaswami Aiyangar* v. *Alamelu Nachiar Ammal*[6] that the High Court was competent to revise an order passed by a Collector under section 35 of the Estates Land Act. Ayling, J., held that an order under section 35 was not an order contemplated by section 205 and that therefore revision lay to the High Court, whereas Krishnan, J., was apparently of the same opinion but also held that there was no reason why the High Court and the Board of Revenue should not have concurrent jurisdiction in revising such proceedings. Again in *Ramaswami Goundan* v. *Kali Goundan*[7] the same Bench held that the High Court had power to revise an order on an application under section 131 of the Estates Land Act, an order to which section 205 was clearly applicable. Ayling, J., in that case agreed with the opinion of Krishnan, J., in the prior case holding that the grant of the power of revision to the High Court under the provisions of section 192 of the Estates Land Act was not inconsistent with the concurrent jurisdiction of the Collector and the Board of Revenue under section 205. This latter decision was followed by Kumaraswami Sastri, J., in *Gopanna Mannadiar* v. *Palani Goundan*[8] and by Ramesam, J., in *Maharaja of Jeypore* v. *Sobha Sundar Dalai*,[4] but their judgments do not add anything to the decisions already quoted.

There is a long series of decisions in the Calcutta High Court, one of the earliest being *Gobind Kumar Chowdry* v. *Kisto Coomar Chowdry*[9] in which it was held that the High Court has revisional jurisdiction over the rent Courts under

2. (1923) I.L.R. 47 M. 250: 45 M.L.J. 735.
3. (1925) I.L.R. 49 M. 499 : (1926) M.W.N. 131.
4. (1925) 49 M.L.J. 540. 5. (1926) 51 M.L.J. 500 (F.B.).
6. (1918) I.L.R. 42 M. 76 : 35 M.L.J. 632.
7. (1918) I.L.R. 42 M. 310 : 36 M.L.J. 571.
8. (1925) M.W.N. 489.
9. (1867) 7 W.R. 520 (F.B.).

F. B.

Raghunadha Patro v. Govinda Patro.

Phillips, J.

Bengal Act X of 1859, and this was affirmed by the Privy Council in *Nilmoni Singh Deo* v. *Taraknath Mukerjee*[10] where their Lordships accept without discussion the finding of the Calcutta High Court that it had jurisdiction. This view was also taken in *Chaitan Patgosi Mahapatra* v. *Kunja Behari Patnaik*,[11] but all these cases can, I think, be differentiated. When the High Court Charter Act was passed, the Bengal Act X of 1859 was in force and the Saddar Court had jurisdiction over these Revenue Courts. The jurisdiction of the Saddar Court was passed on unchanged to the High Court and it is apparently on that ground that the Calcutta High Court has always assumed revisional jurisdiction in these revenue proceedings. This was not the basis of the decision in *Kartik Chandra Ogha* v. *Gora Chand Marto*,[12] but there it was held that even under the Chota Nagpur Tenancy Act VI of 1908 the High Court still possessed jurisdiction on the ground that under section 224 (2) of that Act a second appeal was allowed in certain cases to the High Court and therefore the Courts were subject to the appellate jurisdiction of the High Court. In another case decided in the same year, *Uma Charan Mondal* v. *Midnapur Zamindari Co., Ltd.*,[13] it was held that the High Court had no power to revise certain proceedings under the Chota Nagpur Tenancy Act on the ground that the Revenue Officer was not a Court subordinate to the appellate jurisdiction of the High Court nor subject to its powers of superintendence. In this judgment it was also pointed out that all the cases under Act X of 1859 were clearly distinguishable. With all respect the judgment in this case appears to me to be based on more satisfactory grounds than that in *Kartik Chandra Ogha* v. *Gora Chand Marto*,[12] where the question of whether the Courts were or were not in all respects subject to the appellate jurisdiction of the High Court was not fully discussed. *Kartik Chandra Ogha* v. *Gora Chand Marto*[12] can also be distinguished in this Court on the ground that the Estates Land Act does not in terms provide for an appeal to the High Court and its appellate jurisdiction can only be invoked under section 192 which makes certain portions of the Civil Procedure Code applicable. As these Calcutta cases appear to be inapplicable to this Presidency, the question that remains is whether *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[3] was rightly decided.

---

3. (1925) I.L.R. 49 M. 499 : (1926) M.W.N. 131.
10. (1882) L.R. 9 I.A. 174 : I.L.R. 9 C. 295 (P.C.).
11. (1911) I.L.R. 38 C. 832. 12 (1913) I.L.R. 40 C. 518.
13. (1914) 18 C.W.N. 782.

F. B

Raghunadha Patro
v.
Govinda Patro.

Phillips, J.

The further question of whether *Paramaswami Aiyangar* v. *Nachiar Ammal*[6] and *Ramaswami Goundan* v. *Kali Goundan*[7] were rightly decided does not, strictly speaking, arise for decision.

Before discussing the question, reference may be made to certain portions of the Estates Land Act throwing light on the question before us. I will deal first of all with Chapter XI. Under section 171 an appeal lies to such superior Revenue authority as the Local Government may prescribe, and the Board of Revenue has been prescribed as such. Under section 172 the Board of Revenue has the power of revision. These powers are in respect of orders passed in framing a record-of-rights and these orders are passed by the Revenue Officer under sections 166, 168 and 170. Up to this point in the Act no mention has been made of Revenue Courts, the reference being in all cases either to the Collector or to the Revenue Officer. Under section 76 of the prior Rent Act VIII of 1865, the powers of the High Court were expressly excluded; and unless there is something in the Act itself which gives the power of revision to the High Court there is no reason to suppose that the Legislature intended to confer such powers. Assuming that the High Court has got the power to revise all orders under Chapter XI, it would have concurrent jurisdiction with the Board of Revenue unless the Board is a Court subordinate to it and the latter's orders could also be revised but even so it is somewhat anomalous to give revisional powers to one authority and to allow the orders passed in revision to be again revised. Supposing that the High Court did revise an order under section 172, that order is at once liable to be upset by a suit in a District Munsif's Court under section 173 and the High Court's order would not be final; consequently there is no real ground for presuming that any revisional powers are conferred on the High Court. In section 189 we get the first reference to Revenue "Courts," for it provides that a Collector or other Revenue Officer shall hear and determine as a Revenue Court all suits and applications of the nature specified in Parts A and B of the Schedule. It is noticeable that the Board of Revenue is not specified as an authority to hear and determine as a Revenue Court. Under section 190 a second appeal lies to the Board of Revenue against certain orders passed on appeal by a District Collector, but it does not give such power in the case of orders passed on appeal by the District Court, and against

6. (1918) I.L.R. 42 M. 76 : 35 M.L.J. 632.

7. (1918) I.L.R. 42 M. 310 ; 36 M.L.J. 571.

F. B.

Raghunadha Patro v. Govinda Patro.

Phillips, J.

the latter orders a second appeal would lie to the High Court. In *Ravi Veeraragavulu* v. *Venkatanarasimha Naidu Bahadur*,[14] the Judicial Committee accepted the uniform practice of allowing such second appeals without deciding the question of law involved. When the right of second appeal from orders passed on an application under section 15 or in a suit under section 40 is specifically given to the Board of Revenue, it seems a legitimate inference that no second appeal would lie in such cases to the High Court unless such right is clearly implied and it is nowhere laid down that orders passed by the Board of Revenue will be subject to the revision of the High Court. Coming now to section 205, the Board of Revenue or the District Collector is given the power of revision in cases where no appeal lies and where circumstances are practically identical with the requirements of section 115 of the Civil Procedure Code; but the powers are given only in a limited number of cases, namely, cases where no appeal lies from the original order of the Revenue Officer. Unless then the Board of Revenue is subordinate to the High Court, the decision of this Court in *Ramaswami Goundan* v. *Kali Goundan*[7] would have the effect of giving concurrent jurisdiction to the Board of Revenue and the High Court. That decision is based on the provisions of section 192 which makes a portion of the Civil Procedure Code applicable to all suits, appeals and other proceedings under this Act. There is, however, a limitation in the section which says "Subject to the other provisions of this Act" and "so far as they are not inconsistent therewith." It is recognized in both the cases in 42 Madras that there would be an anomaly in the existence of this concurrent jurisdiction, and although Ayling, J., says in *Ramaswami Goundan* v. *Kali Goundan*[7] at page 312: "It is impossible to say that the grant of the power of revision to this Court is inconsistent with the grant of similar power to the Collector and Board of Revenue," with all respect, it appears to me that if the application of section 115 gives rise to an anomalous position it must be inconsistent with the provisions of the Act. The very fact that two Courts would have co-ordinate jurisdiction and would be in a position to pass conflicting orders, both of which would be final, is sufficient to show that the importation of section 115 is inconsistent with the Act so far as the provisions of section 205 are concerned. I think therefore

---

7. (1918) I.L.R. 42 M. 310 : 36 M.L.J. 571.

14. (1914) L.R. 41 I.A. 258 ; I.L.R. 37 Mad. 443 : 27 M.L.J. 365 (P.C.).

F. B.
Raghunadha Patro v. Govinda Patro.
Phillips, J.

that any argument based upon section 115 must fail unless we premise the argument by a finding that the Board of Revenue is a Court subordinate to the High Court, and even then it would be anomalous to have a power of revision, which is itself subject to revision.

In order to establish this latter point the Government of India Act, section 107, and clause 16 of the Letters Patent are relied upon. Under section 107 each High Court has superintendence over all Courts for the time being subject to its appellate jurisdiction, and under clause 16 of the Letters Patent the High Court shall be the Court of appeal from the Civil Courts and from all other Courts subject to its superintendence. It is, therefore, necessary to determine whether the Board of Revenue is a Court subject to the appellate jurisdiction of the High Court or whether it is a Court subject to the superintendence of the same. So far as the subordination of the Board of Revenue to the appellate jurisdiction of the High Court is concerned, there is no statutory provision for an appeal against its orders to the High Court, but Devadoss, J., both in *Appanna* v. *Latchayya*[2] and in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[3] holds that the Board of Revenue is a Civil Court because it is a Court governed by the Civil Procedure Code and therefore under the superintendence of the High Court. The mere fact that the Civil Procedure Code is made applicable to proceedings under the Act including presumably the proceedings of the Board of Revenue cannot by itself convert the Board of Revenue into a Civil Court subordinate to the High Court unless for some other reason it is a Civil Court subordinate to the High Court such as is referred to in section 3 of the Civil Procedure Code. In the first place it is by no means clear that the Board of Revenue exercising the functions allotted to it under the Estates Land Act is a Court at all, and certainly it cannot be deemed to be a Civil Court within the meaning of section 3 of the Civil Procedure Code, for in section 5 Revenue Courts are clearly distinguished from Civil Courts having original jurisdiction under the Code to try such suits or proceedings as being suits or proceedings of a civil nature and it is apparently Courts of this latter nature that are Civil Courts within the meaning of section 3, Civil Procedure Code. If it is a Court, the Board of Revenue is a Revenue Court and not a Civil Court within the

2. (1923) I.L.R. 47 M. 250: 45 M.L.J. 735.
3 (1925) I.L.R. 49 M 499 : (1926) M.W.N. 131.

F. B.
Raghunadha Patro v. Govinda Patro.
Phillips, J.

meaning of section 3. No doubt in *Nilmoni Singh Deo* v. *Taraknath Mukerjee*[10] their Lordships observe:

> "The Civil Courts referred to in section 77 and the kindred sections, mean Civil Courts exercising all the powers of Civil Courts, as distinguished from the Rent Courts, which only exercise powers over suits of a limited class. In that sense there is a distinction between the terms; but it is entirely another question whether the Rent Court does not remain a Civil Court in the sense that it is deciding on purely civil questions between persons seeking their civil rights, and whether, being a Civil Court in that sense, it does not fall within the provisions of Act VIII of 1859;"

Their Lordships were dealing with rent Courts under Act X of 1859 which were recognized as being subordinate to the High Court, but that pronouncement is hardly an authority for saying that the Board of Revenue, with which the Privy Council were not at that time concerned, is a Civil Court within the meaning of section 3 of the Civil Procedure Code of 1908 which has now replaced Act VIII of 1859. Section 3 is, no doubt, not exhaustive and Courts not specified therein may be subordinate to the High Court, but such subordination must be declared by some enactment or they must be deemed to be subordinate for some sufficient reason. As I have already pointed out, there is no statutory provision making the Board of Revenue a Court subordinate to the High Court, nor any provision providing for appellate jurisdiction in the latter over the former. Unless therefore it can be said that the Board of Revenue is subject to the superintendence of the High Court when acting under the provisions of section 205 it is impossible to hold that it is a Court subordinate to the High Court.

In considering the question of superintendence reliance is placed upon two circumstances, (1) under Order 46, Rule 1, Civil Procedure Code, which is made applicable under the Act, the Board of Revenue can make a reference to the High Court on a question of law, and (2) under section 202 "the High Court may, with the approval of the Local Government, make rules consistent with this Act, declaring that any portions of the Code of Civil Procedure shall not apply, etc. . . . ." This power of making rules is subject to the approval of the Local Government and can hardly be deemed to give power of superintendence to the authority that drafts the rules—an authority which has no power to enforce them without reference to the Local Government .. Secondly, the fact that the Board of

10. (1882) L.R. 9 I.A. 174 · I.L.R 9 C. 295 at 300, 301 (P.C).

F. B.
Raghunadha Patro v. Govinda Patro.
Phillips J.

Revenue can refer a question of law for the opinion of the High Court cannot render it subject to the superintendence of that Court, for the latter has no power to order the Board of Revenue to make a reference which lies entirely within the will and pleasure of the Board of Revenue. The cases relied on by Mr. Krishnaswami Aiyar, *Abdul Karim Fateh Mahomed* v. *Municipal Officer, Aden*[15] and *Municipal Officer, Aden* v. *Ismail Haji*[16] relate to the Resident's Court at Aden from which a reference both on a question of fact and of law lay to the High Court of Bombay, and that High Court had power to make rules binding upon the Court at Aden. In those circumstances the Aden Court was held to be subject to the superintendence of the Bombay High Court, but those circumstances are very different from the present and a decision based thereon cannot be treated as an authority in this case.

We see then that the Estates Land Act does not expressly give any power of superintendence to the High Court over the Board of Revenue nor does it provide for an appeal to the former against the decision of the latter. The ground upon which Devadoss, J., based his decision in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[3] appears to be that because the Civil Procedure Code is applicable to its proceedings the Board of Revenue must be a Civil Court and all Civil Courts are subject to the superintendence of the High Court. This is a very simple proposition, and it was discussed by Rankin, J., in *Allen Bros. Co.* v. *Bando & Co.*[17] and was rejected as there was no ground for inferring appellate jurisdiction in the High Court over Courts constituted after the date of the Charter Act unless some provision to that effect can be established. In order to show that the High Court is an Appellate Court in this respect, we must start with some relation of superior and inferior tribunal—vide *Birendra Kishore Manikya* v. *Secretary of State for India*.[18] In its ordinary aspect the Board of Revenue cannot be held to be a tribunal inferior to the High Court, for its ordinary work is not that of a Court and its powers are mainly executive. In proceedings under the Estates Land Act it may be said that the Board of Revenue exercises judicial powers and is in that sense a Court as pointed out in *Nilmoni*

3. (1925) I.L.R. 49 M. 499 : (1926) M.W.N. 131.
15. (1903) I.L.R. 27 Bom. 575.
16. (1905) L.R. 33 I.A. 38 : I.L.R. 30 Bom. 246 : 16 M.L.J. 73 (P.C.).
17 (1922) I.L.R. 49 Cal 931 at 940.
18. (1920) I.L.R. 48 Cal. 766 at 776.

F. B.
Raghunadha Patro v. Govinda Patro.
Phillips, J.

Singh Deo v. *Taraknath Mukerjee*,[10] but that does not necessarily make it an inferior Court subject to the High Court as a superior Court. In the absence of any provision declaring the Board of Revenue to be subject to the appellate jurisdiction of the High Court it must be held that it is not so subject.

Taking the Act as a whole, the scheme would appear to be that in certain matters the decision is left to the Revenue Courts and an appeal lies to the District Court and thence to the High Court, whereas in other matters the appeal lies to the District Collector as such and not as a Revenue Court, and from him to the Board of Revenue. A similar scheme was held to exist in the Chota Nagpur Tenancy Act in *Uma Charan Mondal* v. *Midnapur Zamindari Co., Ltd.*[13] and an interpretation of the Estates Land Act on these lines would certainly obviate some of the anomalies which arise in any other view, and therefore it is possible to hold that though in certain respects the High Court has revisional powers over the Revenue tribunals, yet in other respects, it may not have the same power, and certainly has not that power so far as the Board of Revenue is concerned. As shown above there is no definite constitution of the Board of Revenue as a Court and if it is deemed to be a Court in that it arrives at a judicial decision, yet there is no authority for holding that it is a Civil Court within the meaning of section 3, Civil Procedure Code, or that it is a Court subject to the appellate jurisdiction or under the superintendence of the High Court. Although, as I have pointed out above, the first part of the question referred to us does not really arise, I think that it may be disposed of as it is so intimately connected with the latter part of the question. I would answer the whole of the question in the negative.

It follows that *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[3] must be held to have been wrongly decided.

Odgers, J.

Odgers, J.—The question referred to us is:

"Has the High Court in the exercise of its revisional jurisdiction either under section 115 of the Civil Procedure Code or section 107 of the Government of India Act of 1919 power to revise orders passed by the Board of Revenue under Chapter XI or section 205 of the Estates Land Act?"

It may at once be said that the consideration of the point as regards Chapter XI of the Madras Estates Land Act did not actually arise on the cases before the Bench; the provisions of

---

3. (1925) I.L.R. 49 M. 499 : (1926) M.W.N. 131.
10. (1882) L.R. 9 I.A. 174 : 9 C. 295 (P.C.).
13. (1914) 18 C.W.N. 782.

F. B.
Raghunadha Patro
v.
Govinda Patro.
Odgers, J.

the Chapter will, however, have to be examined and as in my view the discussion as to Chapter XI and section 205 imports the same principle in both, I think the question may be answered as a whole. It may be premised that no revisional power is given to this Court as far as the Board of Revenue is concerned directly by the Estates Land Act nor does the Board of Revenue appear in the schedules of the Act as a Court of Appeal. It is sought to infer the revisional power of the High Court over the Board of Revenue in two ways. (1) That the High Court is a Court of Appeal under the Act, *e.g.*, from a District Court which is made the Court of Appeal for certain purposes under the Act and from which a Second Appeal would lie to this Court as a matter of long-standing practice (according to the judgment of the Privy Council in *Ravi Veeraragavulu* v. *Venkatanarasimha Naidu Bahadur*[14]). Consequently it is contended the Board of Revenue is subject to its superintendence under clause 16 of the Letters Patent; also under section 107 of the Government of India Act, the High Court has superintendence over all Courts subject to its appellate jurisdiction. It is contended that once a right of appeal is given however limited, it attracts all the provisions of clause 16 of the Letters Patent and section 107 of the Government of India Act. (2) As section 192 of the Madras Estates Land Act makes section 115 of the Code of Civil Procedure applicable to proceedings under that Act, the Board of Revenue must be deemed to be a Subordinate Court to the High Court.

Chapter XI of the Act has to do with surveys, records-of-rights and settlement of rents. Under section 169, the Revenue Officer making the settlement of rent must hear objections thereto and an appeal lies from his decision (section 171) to the prescribed superior Revenue authority. By section 172, the Board of Revenue may revise any record-of-rights. This is said to give the Board of Revenue a co-ordinate revisional power with the High Court. It will be noticed that section 192 incorporates the provisions of section 115 of the Code of Civil Procedure only "subject to the other provisions of the Act" so far as they are not inconsistent therewith and it may be questioned whether this does not afford an example of such inconsistency especially as the right of suit in a Civil Court given by section 173 might involve the consequence of the High Court's order in revision if it exists being overruled by the decree of a

14. (1914) L.R. 41 I.A. 258: I.L.R. 37 Mad. 443: 27 M.L.J. 365 (P.C).

F. B.
Raghunadha Patro
v.
Govinda Patro.
Odgers, J.

District Munsif. This is to my mind a strong point in favour of the argument that the previous steps detailed in the Chapter are non-judicial in character.

The point was considered by Devadoss, J., in *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*,[3] a case under this Chapter XI. He points out that under the Rent Recovery Act of 1865, the High Court had no revisional jurisdiction over the Revenue Courts. He held that the High Court has revisional powers over the Board of Revenue and dismissed the dilemma pointed out by Straight, J., in *Ram Dayal* v. *Ramadhin*,[19] by saying that it would be a question for consideration in each case whether the High Court should exercise its power or not. I may remark that Devadoss, J., seems to have fallen into error in thinking that everything is appealable to the District Court. He says: "In all cases in which the rights of the landholder or the ryot are affected, an appeal is given to the District Court." This is not so—*cf.*, for example, Schedule, Part A, No. 4 (*a*). This decision was concurred in by Waller, J., and both learned Judges based their opinion on *Ramaswami Goundan* v. *Kali Goundan*.[7] The question therefore arises, "Was *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[3] rightly decided?" It may here be noticed that, under section 203 (1) and (2), the record-of-rights prepared under the provisions of Chapter XI are to be considered by the Court trying a suit; (*i.e.*, a civil suit in the ordinary sense) but it may be proved incorrect. This seems to be another argument in favour of the non-judicial character of the steps detailed in Chapter XI. These steps appear to me to amount really to proceedings in a department of Government as to which the Board of Revenue is constituted the final authority as head of that department and given a power of revision. Section 173 gives an aggrieved party an ordinary right of suit. With regard to Chapter XI therefore I am prepared to say that the Board of Revenue is not a Court and its proceedings are not open to revision by the High Court. There are two other ways in the Act in which the Board of Revenue acts as a final authority—apart from the question of revisional power in the High Court which as stated above nowhere appears in the Act itself. (*a*) Section 189—a Collector or other Revenue Officer is authorized to hear and determine as a Revenue Court all suits and

3. (1925) I.L.R. 49 M. 499: (1926) M.W.N. 131.
7. (1918) I.L.R. 42 M. 310: 36 M.L.J. 571.
19. (1890) I.L.R. 12 All. 198.

F. B.
Raghunadha Patro
v.
Govinda Patro.
Odgers, J.

applications in Parts A and B of schedule and no Civil Court is to take cognizance of such. This is the first reference to a "Revenue Court" in the Act. These decrees are subject to appeal either to the Collector or to the District Court as provided for in the schedules. By section 190 a second appeal is to lie to the Board of Revenue from a Collector in two special matters—as to improvements (section 15) or commutation of rent (section 40). This seems to indicate a different line of appeal and as if the Board of Revenue were the final authority as under Chapter XI. (*b*) Under section 205—where a general revisional power is given to the Board of Revenue or Collector in respect of proceedings of Revenue Officers from whose decision no appeal lies.

It is plain that the Board of Revenue can only be a Court subordinate to the High Court if it is made so, for if it is not, section 115, Code of Civil Procedure, which applies to Subordinate Courts will have no application. It is clearly not expressly made so, and it is difficult to see how it can be made so by implication as in none of the schedules is it described as the Court of Appeal in any revenue matter. However the view has been taken that it is a 'Court' and must therefore be subordinate to the High Court. The cases fall into three groups—Madras, Calcutta and Bombay—and I will deal with them in that order.

Valluri Narasimha Rao v. *The Ryots of Peddamamidipalli*[3] has already been referred to. As stated it adopts a previous decision in *Ramaswami Goundan* v. *Kali Goundan*,[7] a revision petition against an order of the Collector under section 131, Madras Estates Land Act. Ayling, J., held that section 192 vests the High Court with the power of revision, that this power vested in both the Board of Revenue and the High Court and that this was undesirable. "It is impossible to say," said the learned Judge, "that the grant of the power of revision to this Court is inconsistent with the grant of similar power to the Collector and Board of Revenue and I think it must be held that section 192 invests this Court with the power of revision which petitioner invokes." The learned Judge does not seem to have adverted to the words in section 192 "so far as they are not inconsistent therewith."

Krishnan, J., adhered to his judgment in *Paramaswami Aiyangar* v. *Alamelu Nachiar Ammal*,[6] which was an earlier deci-

3. (1925) I.L.R. 49 M. 499: (1926) M.W.N. 131.
6. (1918) I.L.R. 42 M. 76: 35 M.L.J. 632
7. (1918) I.L.R. 42 M. 310: 36 M.L.J. 571.

F. B.

Raghunadha Patro v. Govinda Patro.

Odgers, J.

sion of the same bench. This case was a revision petition to revise an order of a Collector as to adding a legal representative of a deceased plaintiff. Ayling, J., invoked section 115 of the Code of Civil Procedure as made applicable by section 192 of the Madras Estates Land Act. Krishnan, J., pointed out that section 115 did not of itself apply to Revenue Courts as defined in section 5 of the Code of Civil Procedure but that section 205 of the Madras Estates Land Act did not apply to proceedings in rent suits and so section 115 remained unaffected. The learned Judge clearly contemplated a co-ordinate jurisdiction in the High Court and the revenue authorities. Again in *Maharaja of Jeypore v. Sobha Sundar Dalai*[4] Ramesam, J., followed these two cases and held that the Revenue Divisional Officer was a Court subordinate to the High Court. In all these cases it will be noticed that the question before us did not arise—*viz.*, the subordination of the Board of Revenue. In *Appanna v. Latchayya*[2] the learned Judges refused to interfere with an order of the Board of Revenue as the petitioner had a separate remedy by suit under section 173. Spencer, J., held that the orders of the Board of Revenue were not judicial proceedings of a Court subordinate to High Court, but Devadoss, J., held that the Board of Revenue was a Civil Court when it acts judicially under sections 171, 172 or any other section of the Madras Estates Land Act and was subject to the revisional jurisdiction of the High Court. The difference of opinion of the two Judges of course made no difference under the circumstances and their remarks as to jurisdiction are therefore *obiter*. In *Gopanna Mannadiar v. Palani Goundan*[8] Mr. Justice Kumaraswami Sastri sitting alone decided that this Court could interfere with an order of the District Collector with which the Board of Revenue had refused to interfere. He followed *Ramaswami Goundan v. Kali Goundan.*[7] In *Ramayya v. Zamindar of Mandasa,*[20] Waller and Madhavan Nair, JJ., stated but did not decide the point. In the Full Bench case in *Zamindar of Kallikote v. Mongolopur*[5] the point is raised but left undecided. The only case therefore really relevant to the present, except *Gopanna Mannadiar v. Palani Goundan*[8] cited above is *Valluri Narasimha Rao v. The Ryots of Peddamamidipalli,*[3] already

2 (1923) I.L.R. 47 M. 250: 45 M.L.J. 735

3. (1925) I.L.R. 49 M. 499: (1926) M.W.N. 131.

4. (1925) 49 M.L.J. 540

5. (1926) 51 M.L.J. 500 (F B).

7. (1918) I.L.R. 42 M 310· 36 M.L.J. 571.

8. (1925) M.W.N. 489.

20. (1926) M.W.N. 351.

F. B.
Raghunadha Patro v. Govinda Patro.
Odgers, J.

referred to. In *Ramaswami Naicker* v. *Subbarayalu Naicker*[1] Sadasiva Aiyar and Moore, JJ., without deciding the point were of opinion that it would be difficult to hold that the Board of Revenue is a Court subordinate to the High Court or subject to the appellate jurisdiction of the High Court. They foresaw the difficulty of a conflict of jurisdictions if the revisional power of the High Court were deemed to exist. In *In re Chinnayya Gounder,*[21] Ayling, J., and myself held that the proceedings of a Revenue Divisional Officer who had framed charges against a village munsif was not subject to the superintendence of the High Court.

Reliance was placed upon a current of authority in Calcutta. These rest primarily on the provisions of the Bengal Rent Act of 1859. Under it, *e.g.*, Collectors and Deputy Collectors are to be Courts controlled by the Board of Revnue (section 151); a decision of a Collector may be tested by suit (sections 77 and 103); execution is to be regulated by rules in force in Civil Courts (section 92). By our Regulation V of 1802 (section 9) the High Court had authority over the Board of Revenue. This was abrogated in 1803 and it is important to remember that at the time of our Charter (1861) there existed in Madras no Revenue Courts as there did in Calcutta. Nor by section 76 of Act VIII of 1865 was there any revisional power over the orders of a Collector save by regular appeal to the Zillah Court. As Rankin, J., points out in *Allen Bros Co.* v. *Bando & Co.,*[17] at page 943 "In 1861 therefore the Saddar Court possessed appellate jurisdiction over the Collector's Court by the terms of the Act of 1859 itself and the High Court inherited therewith a power of superintendence. The cases were fully discussed in *Chaitan* v. *Kunja.*[11] They show that a right of appeal, however limited, will let in the full general power of superintendence, but the right of appeal in those cases is clearly given by the special Code itself and applies to cases within the special jurisdiction conferred thereby." The earliest case is, *In the matter of the petition of Gobind Kumar Chowdhry,*[9] a decision of the Full Bench of the year 1867. The suit was brought under the Act of 1859 and the Deputy Collector refused to order restitution for excess execution. There was no appeal and the Full Bench held that the Deputy Collector was wrong in refusing the application for

1 (1916) 3 L.W. 158.
8. (1925) M.W.N. 489.
9 (1867) 7 W.R. 520 (F.B.).
11. (1911) I.L.R. 38 C. 832.
17 (1922) I.L.R. 49 Cal. 931.
21. (1921) 41 M.L.J. 577.

F. B.
Raghunadha Patro v. Govinda Patro.
Odgers, J.

restitution. It also held that in pursuance of its general power of superintendence the High Court could interfere and direct the Deputy Collector to enforce restitution.

Then came *Nilmoni Singh Deo* v. *Taraknath Mukherjee*.[10] The Collector acted under Act X of 1859 and transferred a decree for rent, the respondent petitioned the High Court to interfere and it stayed proceedings under section 15 of the Charter Act relying on *In the matter of the petition of Gobind Kumar Chowdhry*[9] and thus regarding the Collector as a Court over which the High Court had power of superintendence. The Privy Council simply agreed with the view taken by the High Court without discussion as to jurisdiction. *Chaitan Patgosi Mahapatra* v. *Kunja Behari Patnaik*[11] held that the High Court had power to interfere with the orders of Collectors passed under Act X of 1859 and that except as expressly provided by that Act the procedure of Revenue Courts is governed by the Code of Civil Procedure. The Judges cited *Bhyrub Chunder Chunder* v. *Shama Sundaree Debea*,[11] in which Norman, J, observed:

> "It is clear that the Collector's Court is a Court over which, at the time of the passing of the Charter Act, the Sudder Court possessed appellate jurisdiction, and therefore it is clear that the 15th section of the Charter Act gives us a superintendence over such Courts for the purpose to which I have already alluded."[11]

This seems to indicate that the right of appeal to the High Court at Calcutta is based on its inherited jurisdiction from the Sudder Court over Courts of the Collector. If so, this and the other Calcutta cases are distinguishable on this ground. In *Kartik Chandra Ogha* v. *Gora Chand Marto*[12] the Court held that the High Court could revise proceedings of Courts of Collectors under the Chota Nagpur Tenancy Act. The Court thought that the proceedings under the Act were judicial in character and as section 224 (2) thereof allowed a second appeal to the High Court the Courts of Collectors were subject to the appellate jurisdiction of the High Court. The case turned on the wording of the special Act.

In *H. D. Chatterjee* v. *L. B. Tribedi*[13] it was held that the Calcutta Rent Controller was a Court of civil jurisdiction under rules framed under the Calcutta Rent Act and that therefore the

9 (1867) 7 W.R. 520 (F.B.)
10 (1882) L.R. 9 I.A. 174· I.L.R. 9 C 295 (P.C.)
11. (1911) I.L.R. 38 C. 832 at 838.
22. 1913) I.L.R. 40 C. 518
23. (1921) I.L.R. 49 Cal. 528.

F. B.

Raghunadha Patro v. Govinda Patro.

Odgers, J.

High Court had power to revise his proceedings under section 107 of the Government of India Act. Here again the decision turned on special provisions. Rankin, J., in an elaborate judgment in *Allen Bros. Co.* v. *Bando & Co.*,[17] considers the same question. He held that the Controller and President of the Tribunal act as Courts of Justice—"Civil Courts in the general sense" at p. 938:

"As neither the Rent Controller nor the President of the Tribunal were Courts known in 1861, a right of superintendence can only be made out under the Letters Patent in one or other of two ways; by establishing that it or some other form of appellate jurisdiction has been since granted with reference to the Rent Controller or the President; or secondly, by establishing that the High Court inherited a general jurisdiction over all Courts of Civil Jurisdiction established or to be established."

The learned Judge combats the suggestion that all other Courts of Civil Jurisdiction are subordinate to the High Court:

"As a general proposition applicable to Bengal it seems to me that on the face of the Act of 1861 and the Letters Patent no proposition so simple and wide can possibly be correct. It is nowhere expressed and the several jurisdictions carefully defined and conferred are not to be extended or enlarged indefinitely upon general principles to the rigour of which His Majesty is in no way committed" (page 940).

As to whether the Calcutta Rent Controller is a Court over which appellate jurisdiction can be exercised, after stating the jurisdiction as it stood in 1861 as set out above, the learned Judge points out that

"An actual relationship to this Court must be established; an existing thread of connecting authority must be disclosed."

The learned Judge finally agreed with the view of the Division Bench reported on p. 528 of the same volume. In the words of the learned Judge I must say I fail to see any actual relationship to this Court established by the Madras Estates Land Act between the Board of Revenue and the High Cuort either on the ground that the Board of Revenue is a Court or by reason of the application of section 115 of the Code of Civil Procedure in the restricted sense.

Certain Bombay decisions were quoted to us. In *Abdul Karim* v. *Municipal Officer, Aden*[15] and in *Municipal Officer, Aden* v. *Ismail Haji*[16] the same case in the Privy Council, it was decided that the Aden Resident's Court was subject to the superintendence of the Bombay High Court to which by Act II

15. (1903) I.L.R. 27 Bom. 575.
16. (1905) L.R. 33 I.A. 38: I.L.R. 30 Bom. 246: 16 M.L.J. 73 (P.C.).
17. (1922) I.L.R. 49 Cal. 931.

F. B.
Raghunadha Patro v. Govinda Patro.
Odgers, J.

of 1864 a reference was provided both on fact and law. *Purushottum Janardan* v. *Mahadu Panda*[24] held that a Collector under the Mamlatdars Courts Act was a Court subject to the superintendence of the High Court and that a Collector who granted a certificate under section 10 of the Hereditary Offices Act exercised a judicial function and was therefore subject to the superintendence of the Bombay High Court. (*The Collector of Thana* v. *Bhasker Mahadev Seth*[25]). All these cases turned on the provisions of special Acts. In *Abdur Rahman, son of Ismail* v. *Abdur Rahman, son of Zuhuri*[26] the Full Bench of the Allahabad High Court pointed out that as there was no right of appeal from the Commissioner sitting in an Election Court there could be no power of superintendence under section 107 of the Government of India Act. The Collector acting under section 18 of the Land Acquisition Act, 1894, is not a "Court" (*Balakrishna Daji* v. *The Collector, Bombay Suburban*[27]) and the Court of a Registrar is not a Court for our present purposes.

Reference must be made to *Uma Charan Mondal* v. *Midnapur Zamindari Co., Ltd.*,[13] a case under the Nagpur Tenancy Act. The learned Judges distinguished the cases under the Bengal Rent Act of 1859 and added:

"It would in our opinion be anomalous to hold that where, by statute, superintendence over a Revenue Officer is vested, in a particular matter, in the Commissioner and the Board of Revenue, the Revenue Officer should be deemed even for the purposes of that particular proceeding a Court subordinate to the appellate jurisdiction of the High Court."

Also *Darbari Panjara* v. *Bhoti Roy*[28] affords an instance of two entirely distinct series of Courts referred to by Rankin, J., in *Allen Bros. Co.* v. *Bando & Co.*[17] The Commissioner was constituted by the Regulation of the High Court to which the application in question should have been made. In *Ram Dayal* v. *Ramadhin*[19] the learned Judges held that if the Board of Revenue and the High Court both exercised powers of revision a grave inconvenience and confusion of authorities must ensue. This they said could never have been intended. They thought the Board of Revenue had exclusive jurisdiction to deal with certain cases, but where an appeal to the Civil Court

13 (1914) 18 C.W.N. 782. 17. (1922) I.L.R. 49 Cal. 931.
19. (1890) I.L.R. 12 All. 198.
24. (1912) I.L.R. 37 Bom. 114. 25 (1884) I.L.R. 8 Bom. 264.
26. (1925) I.L.R. 47 All. 513 at 530 (F B).
27. (1923) I.L.R. 47 Bom. 699. 28. (1914) I.L.R. 41 Cal. 915.

F. B.
Raghunadha Patro v. Govinda Patro.
Odgers, J.

Judge is allowed it followed that the High Court had jurisdiction. They held then that the two jurisdictions were separate and distinct. Finally it is sought to infer the power of superintendence from the provisions of Order 46, Rule 1, Civil Procedure Code, which are made applicable by section 192, Madras Estates Land Act. The fact that a point of law may be referred to the High Court for its opinion is a matter entirely within the discretion of the Board of Revenue and the Board cannot from this fact alone be compelled to submit a question for the opinion of this Court. Again, under section 202, the High Court has power to make rules as to the applicability of the Civil Procedure Code in suits under the Act. This power is however subject to the approval of the Local Government and it is difficult to infer an independent power of superintendence under these circumstances from this section.

From these considerations it appears to me that it could not have been the intention of the Legislature that the Board of Revenue which is itself invested with certain revisional powers over the proceedings of its own officers under the Act should be subject in its turn to the revisional jurisdiction of the High Court. It seems to me that convenience is strongly against it and there is no judicial authority for it save that of *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*,[3] which must be considered to have been wrongly decided for the reasons given above. The Calcutta rulings turned on the special circumstances existing in Bengal at the time of the establishment of the High Court. The scheme of the Madras Estates Land Act seems to me to give two distinct series of appellate and therefore of revisional authorities—the Collector and the Board of Revenue for one class of cases and the District Court and the High Court for another. I would therefore as regards the Board of Revenue answer the question referred to us in the negative.

Venkatasubba Rao, J.

Venkatasubba Rao, J.—I regret I cannot agree.

The question that has been referred to us runs thus:—

"Has the High Court in the exercise of its revisional jurisdiction either under section 115 of the Civil Procedure Code or section 107 of the Government of India Act of 1919 power to revise orders passed by the Board of Revenue under Chapter XI or section 205 of the Estates Land Act?"

---

3. (1925) I.L.R. 49 M. 499: (1926) M.W.N. 131.

F. B.

Raghunadha Patro v. Govinda Patro.

Venkatasubba Rao, J.

Under this reference, the position of the Board of Revenue has to be determined in regard to sections 171, 172, 190 and 205. In Chapter XI of the Act occur sections 171 and 172, and in Chapter XV, sections 190 and 205. Chapter XI deals generally with the framing of the record-of-rights. Under section 171, appeals of a certain kind lie to such authority as may be prescribed by the Local Government; and the Board of Revenue has been constituted the appellate authority under this section. Certain revisional powers are conferred on the Board under section 172, and, as I have said, matters dealt with by these two sections fall within Chapter XI.

Section 189, the first section in Chapter XV, contains a very important provision. It says that Revenue Officers shall hear suits and applications specified in parts (*a*) and (*b*) of the Schedule to the Act, *as Revenue Courts*. It goes on to say that decrees and orders passed by the Revenue Courts shall be subject to appeal as provided in the sixth column of parts (*a*) and (*b*). Section 190 provides for second appeals to the Board in two sets of cases against appellate orders of a District Collector in applications under section 15, and against similar orders in suits under section 40.

What is important to bear in mind in this connexion is that both these matters fall within parts (*a*) and (*b*) of the Schedule. The last of the relevant sections is section 205. It confers concurrent powers of revision on the Board and the District Collector in respect of *any proceeding* under the Act before a Revenue Officer, from whose decision no appeal lies.

At the very outset, I desire to point out that the position and functions of the Board must be carefully distinguished with reference to these various provisions. Whether the Board is subordinate to the High Court is not a point to be dealt with in the abstract. The question in each case is, while performing certain specific functions, is it so subordinate? It is for this reason that I wish to stress the point that the character of the Board must be separately considered under each of these sections.

At least two different sets of functions emerge upon an analysis of these provisions:—

(1) The powers of the Board to deal under section 205 with matters arising from decisions of Revenue Officers, constituted Revenue Courts, by the express words of the Act.

Of a kindred nature are the powers of the Board to hear Second Appeals under section 190.

F. B.

Raghunadha Patro v. Govinda Patro.

Venkatasubba Rao, J.

(2) The powers of the Board to deal with other matters; firstly, its powers under section 205 in regard to matters not covered by (1); secondly, its powers under Chapter XI.

Though the reference made to us is comprehensive and includes these various aspects, we have been told, that the point that has arisen, before the referring Bench for actual decision, is of a very limited character, namely, that covered by (1).

Section 192 makes section 115, Civil Procedure Code, a part of the Act. It is as if the later section is written out, or explicitly re-enacted, in the Act itself. The material part of section 115 reads thus:

"The High Court may call for the record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and may make such order in the case as it thinks fit"

Before section 115 can apply, the primary condition must be satisfied, namely, that the Court concerned is subordinate to the High Court.

One of the Courts mentioned in the Act, is the District Court and the test is clearly satisfied in that case—(*see* section 3 of the Code, which provides that the District Court is subordinate to the High Court).

Then let us take the Revenue Courts mentioned in section 189 of the Act. Are they subordinate to the High Court?

There is no definition of subordination in the Civil Procedure Code, although certain concrete instances are given in section 3 as illustrating the rule of subordination.

Clause 16 of the Letters Patent says (it must be clearly noted that I am not here concerned with the other parts of this clause) that every *Civil Court* of the Presidency is subject to the appellate jurisdiction of the High Court. Section 15 of the Charter Act (replaced by section 107 of the Government of India Act) provides that every Court subject to the appellate jurisdiction of the High Court is subject to its power of superintendence.

Reading these two provisions together, every Civil Court in the Presidency is subject to the High Court's right of superintendence, in other words, is subordinate to that Court.

Without even invoking the aid of section 15 (Charter Act) one finds sufficient indication in clause 16 (Letters Patent) itself, that all Civil Courts are subject to the High Court's superin-

F. B.

Raghunadha Patro v. Govinda Patro.

Venkatasubba Rao, J.

tendence; for, clause 16 provides that the High Court shall be a Court of Appeal.

(1) from Civil Courts of the Presidency;

(2) from all other Courts subject to its superintendence. The word "other" in this context implies that the Civil Courts are subject to the High Court.

The question then is—Are the Courts mentioned in section 189 of the Estates Land Act *Civil* Courts? If they are, section 115, Civil Procedure Code, applies. *Nilmoni Singh Deo* v. *Taraknath Mukerjee*[10] is, in my opinion, decisive of the point, that *Revenue* Courts are, for the present purpose, *Civil* Courts. The question arose with reference to rent Courts in Bengal under Act X of 1859. That Act makes a clear distinction between rent Courts and Civil Courts. A decree-holder in a rent Court in a certain district applied for a transfer of his decree to another district. S. 284 of the Civil Procedure Code then in force (Act VIII of 1859) provides, that a decree of any *Civil* Court in British India may be executed within the jurisdiction of any other such Civil Court. The point to be decided was, did this section apply to the *rent* Courts? Its answer depended upon, whether such Courts were or were not *Civil* Courts and the Privy Council held that they were. The reason given for that view is of far-reaching importance. It is true that Act X makes a certain distinction between civil and rent Courts; but their Lordships explain that Civil Courts are Courts exercising all the powers of Civil Courts, as distinguished from rent Courts, which only exercise powers over suits of a limited class. In a sense, of course, there is a distinction between these two terms; but a rent Court does none the less remain a Civil Court, as it does decide purely civil questions between persons seeking their civil rights. By this reasoning their Lordships came to the conclusion that the rent Courts under Act X were Civil Courts within the Code of Civil Procedure.

This case is, in my opinion, of the utmost importance in deciding the present point; but I want to make it perfectly clear. that I am relying upon *Nilmoni Singh Deo* v. *Taraknath Mukerjee*[10] for this purpose alone. I say advisedly "for this purpose alone" for, in the argument there was a tendency to overlook that this case decides two entirely unconnected questions, the other point decided being that the High Court had jurisdiction under section 15 of the Charter Act, to interfere, with the

10. (1882) L.R. 9 I.A. 174: I.L.R. 9 C. 295 (P C).

F. B.
Raghunadha Patro v. Govinda Patro.
Venkatasubba Rao, J.

orders of the rent Courts. On what ground this jurisdiction was assumed to exist (there is no discussion either in the judgment of the High Court or in that of the Privy Council), it is immaterial to enquire. To come back to the main point, *Nilmoni Singh Deo* v. *Taraknath Mukerjee*[10] clearly affirms that Revenue Courts, although so designed on account of their more limited jurisdiction, are nevertheless, properly understood, Civil Courts.

This decision of the Judicial Committee throws a flood of light upon the subsequent legislation on this point. The Indian Legislature realized that the moment Revenue Courts were established, if nothing was said regarding their procedure, the provisions of the Civil Procedure Code would automatically apply to them. Section 5 of Act V of 1908 (the present Code of Civil Procedure), for instance, owes its origin to this fact. That section says, that where any special enactment applicable to Revenue Courts is silent in regard to rules of procedure, it shall be open to the Local Government to declare that any portions of the Code shall not apply to those Revenue Courts, or, shall apply subject to such modifications as may be prescribed. It was again with the same object that section 192 was enacted in the Madras Estates Land Act. It was inserted in order to regulate the applicability of the Civil Procedure Code to proceedings under that Act, for, the Legislature was aware that, if nothing was said in regard to the procedure, the whole of the Code would apply. From what I have said, it follows that what are termed Revenue Courts under the Act are subject to the High Court's power of superintendence.

Next, if these Courts are subordinate to the High Court, is the position of the Board different in this respect, when it deals with appeals or revisions pertaining to orders of revenue officers, under section 189? This depends upon another question, is the Board, while performing those functions, a Court at all? The revenue officers having been by the very terms of the Act, constituted Courts, when hearing certain suits or applications, it is a necessary corollary, in my opinion, that the Board, governed as it is by the same rules of procedure, should also be deemed a Court, when dealing with the same matters at a later stage. An appeal is but a continuation of the suit and the order of an appellate tribunal is in truth the final decision in the proceeding initiated in the Court of the First Instance. It is there-

10. (1882) L.R. 9 I.A. 174: I.L.R. 9 C. 295 (P.C.).

F. B.

Raghunadha Patro v. Govinda Patro.

Venkatasubba Rao, J.

fore difficult to regard an appellate or revisional authority (made expressly subject to the same rules of procedure) which deals with another stage of the same case, as anything but a Court. If the Board is a Court, it matters little whether you call it a Revenue or a Civil Court, for, as I have shown above, every Revenue Court in common parlance is a Civil Court in the wider sense of that term. If this conclusion is correct, the Board is a Court subordinate to the High Court under section 115, Civil Procedure Code.

Let me take another line of argument. Are the Courts mentioned in section 189 subject to the High Court's appellate jurisdiction? If they are so subject, the High Court has right of superintendence over them. (Section 15 of the Charter Act or section 107 of the Government of India Act).

The Act itself provides for appeals in certain cases to the District Court [*see* parts (*a*) and (*b*)]. It is not disputed that decisions of the District Courts may be taken to the High Court as the final Court of Appeal. (*Vide* section 100, Civil Procedure Code, and *Ravi Veeraraghavalu* v. *Venkatanarasimha Nayudu Bahadur*[14]). If the intermediate Court, *viz.*, the District Court, is subject to the High Court's appellate jurisdiction, I think it follows that Courts of the lower grade are necessarily so subject though indirectly. For, what is the effect, say, of the High Court's adjudication setting aside a decision of the District Court reversing that of the first Court? It merely restores the decision of the last mentioned Court. It is immaterial again that it is not every order made by a Revenue Court (under section 189) that is subject to an appeal to the District Court, and indirectly to the High Court. For, if from a subordinate Court appeals lie to the High Court only in certain specified cases, then that Court is nevertheless subject to the appellate jurisdiction of the High Court, and thus becomes by force of section 15 of the Charter Act, subject to its power of superintendence. *In the matter of John Thompson*[29] and *Sheo Nandan* v. *King-Emperor.*[30] Adopting this reasoning, one reaches the conclusion—and that conclusion is inevitable—that the Courts specified in section 189 are subject to the superintendence of, in other words, subordinate to, the High Court.

---

14. (1914) L.R. 41 I.A. 258: I.L.R. 37 M. 443 at 453: 27 M.L.J. 365 (P.C.).
29. (1870) 6 Beng. L.R. 180.
30. (1918) 3 Pat. L.J. 581 (F.B.).

F. B.

Raghunadha Patro v. Govinda Patro.

Venkatasubba Rao, J.

I may mention here, by way of answer to a suggestion made at the bar, that it is wrong to assume that the Courts mentioned in section 107 of the Government of India Act (section 15 of the Charter Act) as being subject to the High Court's appellate jurisdiction, are restricted to such Courts as were in existence, at the time of the passing of the Charter Act or the issue of the Letters Patent. The wording is perfectly clear. The section says:

"Each of the High Courts has superintendence over all Courts *for the time being* subject to its appellate jurisdiction."

I understand this to mean, that if at any point of time you are able to predicate of a Court, that it is subject to the High Court's appellate jurisdiction, it necessarily follows that it is equally subject to the High Court's superintendence. There is a marked contrast between the wording of sections 106 and 107 of the Government of India Act (clauses 9 and 15 of the Charter Act). Section 106 says *inter alia* that the High Courts have

"all such jurisdiction, powers and authority as are vested in those Courts respectively at the commencement of this Act"

There is no reference to the "commencement of the Act" in section 107. It would, in my opinion, be a mistake to import into section 107, while construing that section, words that are not there, but are found only in section 106. There is a slight difference in the wording between clause 15 and section 107. The words "for the time being" do not occur in clause 15, which reads thus:—

"Each of the High Courts . . . . shall have superintendence over all Courts which may be subject to its appellate jurisdiction."

The meaning is the same and the absence of those words matters nothing. We cannot convert "may be subject" into "are now subject."

I have thus, adopting a different argument, again come to the same conclusion, that the Revenue Courts exercising jurisdiction under section 189 are subject to the superintendence of the High Court. Starting then from that point, I proceed to the next question, what is the position with reference to that Court, of the tribunals exercising appellate or revisional jurisdiction in respect of those inferior Revenue Courts, concerning matters falling under that section? The Board of Revenue being at the head of the graded tribunals mentioned in the Act, is either subordinate to the High Court or co-ordinate with that Court. No third alternative is either possible or has been suggested. To invest with final and supreme authority two parallel bodies with co-equal powers seems opposed to reason. That there can be two final decisions in the same case, possibly

F. B.

Raghunatha Patro v. Govinda Patro.

Venkata-subba Rao, J.

conflicting, is a position utterly repugnant to the character of a judicial proceeding. By the Act, the Board is expressly constituted the revisional authority over the Revenue Courts. Under the decisions and on a true construction of the provisions of the Government of India Act and the Letters Patent, the High Court is also possessed of similar revisional powers. As the Board and the High Court have concurrent revisional powers, does it follow that they are co-ordinate bodies? I think not. Investing two tribunals, one admittedly inferior to the other, with concurrent revisional powers, is not unknown to the Indian Statute law. Under section 436 of the Criminal Procedure Code, the High Court as well as the Sessions Court are invested with certain concurrent revisional powers. From this circumstance, would it be a legitimate inference, that they are bodies co-equal in rank? Although both the Courts are clothed with the same authority, it is undoubted that an order of a Sessions Judge under that section is liable to be set aside or reversed by the High Court.

Because two tribunals have equal powers of revision, it does not necessarily follow that they are tribunals of equal rank. To hold otherwise would lead to an anomaly. If the Board were independent of the High Court, what would prevent it from taking up a case in revision and arriving at a conclusion different from that of the High Court? I am aware that by the terms of section 192 of the Act no provision of the Civil Procedure Code can be applied so as to produce a result inconsistent with the provisions of that Act. No such result is produced by my view being adopted; on the contrary, a grave anomaly is avoided. I am therefore of the opinion that the High Court has power of superintendence over the Board.

Mr. Krishnaswami Aiyar suggests that the High Court has superintendence over the Board, because, in the first place, under section 202 of the Estates Land Act, the High Court has power to make rules governing the Board's Proceedings, and secondly, because it is competent to the Board to make a reference to the High Court. (By section 192 of the Act, the chapter in the Civil Procedure Code relating to reference is made applicable). For this position, he relies upon *Abdul Karim* v. *Municipal Officer, Aden*[15] and *Municipal Officer, Aden* v. *Ismail Haji*[16]. In the view I have taken, it is unnecessary to consider this argument.

---

15. (1903) I.L.R. 27 Bom. 575.

16. (1905) L.R. 33 I.A. 38: I.L.R. 30 Bom. 246: 16 M.L.J. 73 (P.C.).

F. B.

Raghunadha Patro v. Govinda Patro.

Venkatasubba Rao, J.

I have now shown by two different lines of reasoning that the Board is a Court subordinate to the High Court when dealing with matters arising out of suits or applications referred to in section 189 of the Act.

My conclusion therefore is, and I would state my answer to the reference accordingly, that the following decisions of the Board are subject to the revisional jurisdiction of the High Court:—

(1) All adjudications under section 190 as they necessarily arise out of suits or applications specified in section 189, clauses (1) and (2).

(2) Adjudications under section 205, so far as they relate to matters arising out of suits or applications specified in section 189, clauses (1) and (2).

What I have so far dealt with, comes under the first of the two divisions, which I adopted at the commencement of my judgment, in classifying the functions of the Board. On the second heading I refrain from expressing any opinion, for, any observations on the point would be *obiter dicta,* as the question does not arise for decision in the case itself. Moreover, it seems to me, whatever one's conclusion may be, that the question has to be decided with reference to considerations entirely different from those to which I have had regard in deciding the other point.

I shall now turn to the authorities cited before us. As regards the cases under the Estates Land Act itself, all the decisions so far have held that the inferior Revenue Courts are subordinate to the High Court, and, there being no conflict of opinion on this point, I assume that we are not called on to examine the soundness of that view. Should, however, the reference be deemed to include this question also, my answer is, that I respectfully agree with the view that has been *uniformly* taken in these cases. Then, in regard to the position of the Board of Revenue, there has been some difference of opinion, but I must point out that in the cases in which the question came up, it did not arise in the form in which it has now arisen; for it was the position of the Board under Chapter XI that was under discussion in those cases. That question, as I have shown, must be excluded from this reference. With these observations I shall examine the more important of the cases that have been cited.

F. B.
Raghunadha Patro v. Govinda Patro.
Venkatasubba Rao, J.

In *Paramaswami Aiyangar* v. *Nachiar Ammal*[2] and in *Ramaswami Goundan* v. *Kali Goundan*[7] it was held by Ayling and Krishnan, JJ., that revision petitions to the High Court were competent against orders of Deputy Collectors acting as Revenue Courts. These decisions necessarily imply that the Revenue Courts under the Act are subordinate to the High Court. The same view was taken by Ramesam, J., in *Maharaja of Jeypore* v. *Sobha Sundar Dalai*[4]. The next case takes us one step further, and that is the decision of Kumaraswami Sastri, J., in *Gopanna Mannadiar* v. *Palani Goundan*[8]. The point to note about this case is, that the order revised by the High Court was not, as in the other three cases, an order of a Revenue Officer as defined by the Act. The original order was that made by the Sub-Collector and the District Collector who heard an appeal from it arrived at a certain decision and it was this, that was taken to the High Court in revision. An appellate authority is not expressly constituted a Revenue Court by section 189, and yet the learned Judge held that that tribunal was likewise subordinate to the High Court. This lends support to my view, that if the first tribunal is a Court, it follows that the higher authority is similarly a Court, more especially, bound as it is by the Act, to observe the same procedure as the tribunal of the first instance. In this respect I find no difference in principle between a District Collector and the Board. Neither of them is a Revenue Court under the express terms of the Act. The District Collector is in some cases an appellate and in some cases a revisional authority. The Board of Revenue has appellate powers under section 190 and revisional powers under section 205. Therefore in regard to the matter under discussion, what applies to the District Collector equally applies to the Board. *Appanna* v. *Latchayya*[6] and *Valluri Narasimha Rao* v. *The Ryots of Peddamamidipalli*[3] are cases dealing with Chapter XI of the Act, and, in my opinion, have no bearing on the point that has now arisen for actual decision; but these cases are useful as showing that every Judge who took part in them (Spencer, J., Devadoss, J. and Waller, J.) accepted without question the authority of the rulings reported in *Paramaswami*

2. (1923) I.L.R. 47 M. 250 : 45 M.L.J. 735.
3. (1925) I.L.R. 49 M. 499. (1926) M.W.N. 131.
4. (1925) 49 M.L.J. 540.
6 (1918) I.L.R. 42 M. 76: 35 M.L.J. 632.
7. (1918) I.L.R. 42 M. 310: 36 M.L.J. 571.
8. (1925) M.W.N. 489.

F. B.

Raghunadha Patro v. Govinda Patro.

Venkatasubba Rao, J.

Aiyangar v. *Alamelu Nachiar Ammal*[6] and *Ramaswami Goundan* v. *Kali Goundan*[7].

I am unable to derive any assistance from *Darbari Manjara* v. *Bhoti Roy*[28]. The decision in that case depended upon the constitution of certain Courts under Regulation V of 1893, which Regulation seems to have nothing in common in regard to the present point with the Estates Land Act. Under that Regulation two different classes of Courts were recognised, those established under the Bengal Civil Courts Act and those under the Sonthal Parganas Act. Under the former Act there were two grades of Courts, that of the District Judge and those of the Subordinate Judge. Under the latter Act there were four grades of Courts, namely, those of the Commissioner, the Deputy Commissioner, Sub-divisional Officers and Sub-Deputy Collectors. It was held in that case that the second set of Courts were not subordinate to the High Court. I fail to see what analogy the case before us has to the case cited. What is suggested is, that under our Act there are two series of Courts also, one series consisting of the Revenue Officer, the District Court and the High Court and the other series of the Revenue Officer, the District Collector and the Board of Revenue. The Court of the lowest grade (it must however be noted) is in both series the same Court; what is even more important, in the Calcutta case, the one set of Courts was governed by the general law and the other set of Courts by directions issued by the Lieutenant-Governor. Again, the Bengal Regulation itself constitutes the Deputy Commissioner, the District Court and the Commissioner, the High Court. The circumstances are so entirely different that this case is no guide in deciding the point raised. Moreover, it would be impossible to reconcile this theory of two parallel sets of Courts with the Madras decisions to which I have referred; for it will be observed that in those cases the High Court interfered with the orders of Revenue Officers where appeals lay to the District Collector.

Another case which has been relied on by Mr. Venkattarama Sastri is *Uma Charan Mondal* v. *Midnapur Zamindari Co., Ltd.*[13] relating to Chota Nagpur Tenancy Act. It was held in that case that where superintendence over a Revenue

6. (1918) I.L.R. 42 M. 76: 35 M.L.J. 632.
7 (1918) I.L.R. 42 M 310: 36 M.L.J. 571.
13. (1914) 18 C.W.N. 782.
28. (1914) I.L.R. 41 Cal. 915.

F. B.

Raghunadha Patro v. Govinda Patro.

Venkatasubba Rao, J.

Officer is vested in a particular matter in the Commissioner and the Board of Revenue, the Revenue Officer should not be deemed, for the purpose of that particular proceeding, a Court subordinate to the High Court. This case is not of much help, as the decision seems to rest on the footing that the proceeding in question was not a judicial proceeding. It was on this express ground, that a previous case of the same Court, namely, *Kartik Chandra Ogha* v. *Gora Chand Mahto,*[12] was distinguished, where it had been held that although powers of revision and control were vested under the Chota Nagpur Tenancy Act in the Commissioner and the Board, the Deputy Commissioner was nevertheless subject to the Appellate Jurisdiction of the High Court. I may remark that several other cases similarly dealing with special enactments or statutes have been cited, with which I do not propose to deal. They do not seem to serve any useful purpose in deciding a point that has arisen under the Act in question. I am, however, satisfied that my conclusion is not opposed to the principles which have been recognised in the cases to which our attention has been drawn.

In the result I am of the opinion that the conclusion I have arrived at, on an examination of the various provisions of the law bearing on the subject, is not opposed to the principles established by the cases, which have either a direct or indirect bearing on the point.

N.S. *Reference answered in the negative.*

[The question whether the Board of Revenue is subject to the Power of Superintendence of the High Court under S. 107 of the Government of India Act, and cl. 16 of the Letters Patent has been referred to a Full Bench. By Wallace and Thiruvenkatachariar, JJ., on 21st September 1928. *See* C.R.P. No. 192 of 1926, and C.R.P. No. 1109 of 1926. Ed.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE ODGERS AND MR. JUSTICE MADHAVAN NAIR.

Hassan Kutti Beary .. *Appellant** (*Deft.*)

v.

Jainabha .. *Respondent* (*Plff.*)

Hassan Kitti Beary v. Jainabha.

Muhammadan Law—Shafi school—Marriage of—Adult virgin without her consent—Validity—Difference between Hanafi and Shafi Law.

The marriage of a Muhammadan woman who is an adult virgin is, under the Shafi Law, invalid, if her consent to the marriage has not been obtained.

---

* S. A. No. 934 of 1926. 5th September, 1928.

12. (1913) I.L.R. 40 C. 518.

Hassan Kutti Beary v. Jainabha.

Per Madhavan Nair, J—The only difference between the Hanafi Law and the Shafi Law as regards the question of the consent of an adult virgin to her marriage is that, under the Shafi Law, the consent must be expressed through a *wali* and not direct as under the Hanafi Law.

Second Appeal against the decree of the District Court of South Kanara, dated 23rd November, 1925, in Appeal Suit No. 396 of 1925, preferred against the decree of the Court of the District Munsif of Kasargod, dated 24th June 1925 in Original Suit No. 204 of 1925.

B. Sitarama Rao for appellant.

K. S. Krishnaswami Aiyangar for respondent.

The Court delivered the following

Odgers, J.

JUDGMENTS.—*Odgers, J.*—This is a Second Appeal from the decree of the learned District Judge of South Kanara confirming that of the District Munsif, and the question is has the father of the plaintiff the right to marry her to the defendant without her consent? The parties are Moplahs and Sunni Muhammadans. The case has been argued on the assumption that they belong to the Shafi sect of the Sunnis. Nikka was performed by the father of the plaintiff in the Talangere Mosque, and the question is—is this an irrevocable marriage? The plaintiff is an adult virgin and it is not proved that she has been consulted or that her consent has been obtained. Another important sect of the Sunnis is the Hanafis. There is no doubt that a woman cannot be married in that sect without her consent. The learned Advocates on each side have been at pains to bring to our notice every possible authority which exists in the text-books. There are practically no cases on the point, and therefore the text-writers must be shortly examined.

Wilson in his Anglo-Muhammadan Law, p. 68, points out as one of the chief variations of the Shafi creed that women have less freedom of choice in the matter of marriage. He says :

"Not only female minors, but adult women who are virgins, may be disposed of in marriage by the father or paternal grandfather without their consent and though widows and divorced women cannot be given in marriage against their will, even they re-marry without the intervention of a guardian or wali."

And in the same book (Ch. 13) dealing with the peculiarities of the Shafi school of Sunni Muhammadans and quoting from the Minhaj, a work dating from the 13th century of the Christian era, he says :

"Not only female minors, but adult women who are virgins may be disposed of irrevocably in marriage by the father or failing him by the

Hassan Kutti Beary v. Jainabha.

Odgers, J.

paternal grandfather with or without their consent; but their consent is nevertheless considered desirable"

Minhaj-et-Talibin which has been translated apparently under the authority of the Dutch Government for use among Shafi Muhammadans of Java says at page 284 :

"If his daughter is a virgin the father can dispose as he pleases or remarry."

And he adds :

"It is, however, always commendable to consult her as to her future husband, and her formal consent to the marriage is necessary if she has already lost her virginity."

In the prefatory note, the Editor says :

"It is not always possible to decide the question by reference to Minhaj alone."

But the two other treatises to which he refers as the two standard works in the whole modern literature on the school of Shafi are unfortunately not available to us here. The late Syed Amir Ali in his introduction to Muhammadan Law cites Minhaj as a Shafi work of repute but is himself quite definite as he remarks :

"Among Shafis and Malikis, although the consent of the adult virgin is as essential as among Hanafis and Shiahs as to the validity of a contract of marriage entered into on her behalf, she cannot contract herself in marriage without the intervention of a wali."

If that is to be taken as the modern view on the subject, it seems to me that there is no more to be said.

A good deal of the learning on this part of the subject is concerned with the competence to contract marriage. According to Mr. F. B. Tyabji at page 91 of his book :

"A Shafi thayyaba is competent to contract marriage, i.e., to enter into a contract of marriage but not a woman who is a virgin."

At page 97 the learned author says : that the consent to the marriage of a person not competent to enter into a contract of marriage must be expressed by his or her guardian for marriage who is a wali. This would also seem to point to the conclusion arrived at by Syed Amir Ali to the effect that consent was necessary. The answer to that argument put forward is that the consent has been given on her behalf by the father as her wali. That of course cannot be because the Lower Courts have found as a fact that she was never asked and she had never even seen her future husband. So that her consent was never expressed either personally or through a wali at all. Hedaya in Chapter 2 on Guardianship and Equity mentions the Shafi assertion that a woman can by no means contract herself in marriage in any circumstances whether with or without the consent of her

guardian. That must simply mean the mode of expressing consent. Further at page 96 Hedaya says :

"It is not lawful for a guardian to force into marriage an adult virgin against her consent. This is contrary to the doctrine of Shafi who accounts an adult virgin the same as an infant"

And the argument of the Shafi is refuted by the argument of "our doctors.", Hanafis. Sir Abdur Rahim says as follows at pages 330 and 331 :

"According to the Hanafis, every person who is not a minor whether male or female maiden or thayyaba (that is, a girl who has had sexual intercourse) is competent to contract marriage and cannot be given in marriage without his or her consent whether by the father or any other relative The Shafis and Malikis agree with the Hanafis so far as boys and thayyabas who have attained majority are concerned; the former, however, hold that a minor thayyaba is competent to contract marriage and a maiden, even if she has attained majority, cannot marry without the consent of the guardian, while the Hanafis in each of these two cases hold the contrary view. Thus with the Hanafis so far as the females are concerned minority is the test whetheir the intervention of a guardian is necessary or not and with the Shafis the test is whether a girl is a maiden or thayyaba The difference between the two sects on this point though not perhaps of much practical significance involves a question of principle. The Hanafis' allege that the Shafis' refusal to acknowledge the right of a maiden of full age to contract marriage of her own will amounts to a breach of a cardinal principle of Muhammadan Law, namely, that the legal status of a grown up female is as complete as that of a male."

Even in that passage the learned author is concerned with the capacity to enter into the marriage contract, *i.e.*, as to whether the intervention of a wali is necessary or not. In the Muhammadan Law marriage would appear to be nothing more nor less than a contract and therefore there must be consent. How that consent is to be expressed is a matter on which as already stated there appears to be much learning and some confusion appears to exist as will be apparent from the quotations already given between the necessity of such consent and the mode of its expression. In Amir Ali page 343 it is said that

"A woman who is sane, free and adult can marry herself to an equal, with or without the consent of any person who might be her wali."

"Shafi and Malik hold a contrary opinion" says the Radd-ul-Muhtar, "but there is no authentic *hadis* in support of their views. At the same time it is recommended as more consistent with decorum that an adult virgin should entrust the negotiations of her marriage to a wali in whom she has trust"

In the recapitulation at page 350 the learned author says:

"Under the Maliki and Shafi Law the marriage of an adult girl is not valid unless her consent is obtained to it. But such consent must be given through a legally authorised wali who would act as her representative."

Hassan Kutti Beary v. Jainabha.

Odgers, J.

In a case of *Muhammad Ibrahim* v. *Gulam Ahmed*[1] it was held that according to the doctrine of Shafi a virgin whether before or after puberty cannot give herself in marriage without the consent of her father. That of course is not this case at all.

Giving the best consideration I can to these various authorities it seems to me that the only view against the position taken up by the Lower Courts is that of Wilson, and even he says that consent is commendable. There is further the evidence in this case of a Musaliar, D. W. 2, who says he is a teacher of Sastras by which, I suppose, he means the Koran. He says that among Shafis consent of the girl is not necessary for the first marriage but that all the books state that it is better to get it. It would have been interesting if a body of evidence had been given in the first Court as to the ideas obtaining among the best opinions of the community of the present day on this subject. I do not imagine that these opinions have retrogressed and become more conservative as time has gone on; and it may be that the better opinion among the Shafis on the West Coast is that no adult virgin should be married without her consent. However that may be, the question is here whether enough has been shown to enable us to say in second appeal that the view taken by both the Lower Courts is manifestly wrong in law. I am by no means persuaded that it is. I think therefore that the decree of the Lower Appellate Court should be confirmed and this second appeal dismissed with costs.

Madhavan Nair, J.

Madhavan Nair, J.—This Second Appeal arises out of a suit instituted by the plaintiff for a declaration that she is not the properly wedded wife of the defendant and for an injunction restraining the latter from asserting his rights as her husband.

The parties are Sunnis and they belong to the Shafi sect. The Lower Courts have found that the plaintiff had attained puberty at the time of the marriage, that no consummation ceremony was performed and that her consent has not been obtained by her father for the performance of the nikka. It was contended on her behalf that, she being an adult virgin, the nikka performed without her knowledge and consent is invalid under the Shafi Law. This contention has been upheld by the Lower Courts.

The question for consideration is whether the marriage of a Muhammadan woman who is an adult virgin is under the Shafi Law invalid owing to want of consent on her part. There are

1. (1864) 1 Bom. H.C.R. 236.

Hassan Kutti Beary v. Jainabha.

Madhavan Nair, J.

no decisions directly bearing on the question; the case reported in *Muhammad Ibrahim* v. *Gulam Ahmed*[1] does no more than point out the difference between the Hanafi and the Shafi Law on this point. The evidence of D. W. 2, the Khaliff of Puttur, the only witness who speaks on this question, is not much helpful as he does not refer to instances of marriages declared invalid by the Court or held so by the community owing to want of consent on the woman's part. The case has therefore to be decided on the statements of the Law contained in the various recognised text-books of authority on Muhammadan Law.

The appellant's contention that want of consent on the part of the woman does not invalidate her marriage under the Shafi Law is supported by the statement of the Law contained in Wilson's Anglo-Muhammadan Law, Hamilton's Hedaya and Minhaj-et-Talibin. In Wilson's book the law with regard to Shafi Muhammadans is stated as follows :

"Not only female minors, but adult women who are virgins may be disposed of irrevocably in marriage by the father with or without their consent; but their consent is nevertheless desirable"—(*See* p. 407, para. 392.).

In Hamilton's Hedaya, Vol. 1, page 96, the law is thus stated :

"It is not lawful for a guardian to force into marriage an adult virgin against her consent. This is contrary to the doctrine of Shafi, who accounts an adult virgin the same as an infant, with respect to marriage, since the former cannot be acquainted with the nature of the marriage any more than the latter, as being equally uninformed with respect to the matrimonial state, whence it is that the father of such an one is empowered to make seizure of her dower without her consent."

Minhaj-et-Talibin (Guide of the earnest enquirer), a book dating from the 13th century of the Christian era and which is exclusively devoted to a statement of the principles of the Shafi Law, also supports the contentions of the appellant. It is stated in that book that

"a father can dispose, as he pleases, of the hand of his daughter without asking her consent whatever her age may be, provided she is still a virgin. It is, however, always commendable to consult her as to her future husband." (*See* p. 284, Sec. 4, para. 3).

Though this is a book exclusively devoted to a statement of the Shafi Law, it is difficult to say to what extent it can be relied on in deciding questions arising under the Shafi Law. Though the translator says that "the book occupies the first rank

1. (1864) 1 Bom. H.C.R. 236.

Hassan Kutti Beary v. Jaithabba.

Madhavan Nair. J.

for deciding legal cases," he later on modifies the effect of the statement by saying :

"It is not always possible to decide a question by reference to Minhaj and in such a case a Muhammadan jurist . . . . . has recourse principally to the Tohfa and the Nihaya, which Dr. Th. Juynboll in his *Handbuch des Islamischen Gesetzes,* 1910, calls 'the two standard works in the whole modern Fikh literature of the School of Shafi."

We have not been able to refer to these two books. Even according to Minhaj-et-Talibin, it is always commendable to consult a woman as to her future husband and we have already noticed that Mr. Wilson also says "that the woman's 'consent is nevertheless desirable'.

Against this authority the respondent relies mainly on the statements of the Shafi Law contained in Mr. Amir Ali's Muhammadan Law, Third Edition, Vol. II, at p. 350, and Mr. Tyabji's Text-book of Muhammadan Law. In the former book it is stated that

"To re-capitulate : Under the Maliki and Shafi Law, the marriage of an adult girl is not valid unless her consent is obtained to it, but such consent must be given through a legally authorised wali, who would act as her representative. Under the Hanafi and Shiah Law, the woman can consent to her own marriage either with or without a wali."

Speaking of the competence of a female to enter into a contract of marriage, Mr. Tyabji states in para. 17-B of his Principles of Muhammadan Law, that

"(*a*) According to the Hanafi Law she becomes competent when, being of sound mind, she attains puberty. (*b*) According to the Shafi and Maliki Law, a thayyaba is competent so to contract but not a woman who is a virgin."

And after thus dealing with the capacity of parties to enter into a contract of marriage, the law with regard to the consent of parties is thus stated :

"(1) The consent to the marriage of a person competent, under S. 17-B above, to enter into a contract of marriage, must be expressed either by himself or his duly authorised agent or proxy. (2) The consent to the marriage of a person not competent to enter into a contract of marriage under S. 17-B must, subject to the said section, be expressed by his or her guardian for marriage or by the duly authorised agent or proxy of such guardian." (*See* para 20, page 97.)

It would seem that, in the opinion of this writer, though an adult virgin cannot, owing to her incapacity to enter into a contract, express her consent except through her guardian for marriage or by the duly authorised agent or proxy of such a guardian, nevertheless her consent is necessary

to render the contract of marriage valid. This is what we can gather impliedly by reading the two paragraphs 17 and 29 together. Nowhere does the learned author say explicitly that a Shafi woman can be married with or without her consent by her father if she is an adult virgin; but his opinion seems to be, as I have indicated above, in favour of the view that the consent of an adult virgin is necessary to render her marriage valid under the Shafi Law.

It will thus be obvious that the authorities on the question are very much divided and except Mr. Amir Ali and Mr. Tyabji—the former expressly and the latter impliedly—all the other text-writers that we have thus far exaxmined point out that the marriage of an adult virgin under the Shafi Law will not be invalidated by want of her consent, whereas, under the Hanafi Law, the woman's consent is necessary to render the marriage valid. The opinion of Sir Abdur Rahim has been referred to by both the appellant and the respondent. In page 330 of his book on Muhammadan Jurisprudence" the learned writer states his view as follows :

> "According to the Hanafis, every person who is not a minor, whether male or female, maiden or tayyiba (that is, a girl who has had sexual intercourse) is competent to contract marriage and cannot be given in marriage without his or her consent whether by the father or any other relative. The Shafiis and the Malikis agree with the Hanafis so far as boys and thayyabas who have attained majority are concerned: the former, however, hold that a minor thayyaba is competent to contract marriage and a maiden even if she has attained majority, cannot marry without the consent of the guardian, while the Hanafis in each of these two cases hold the contrary view. Thus with the Hanafis, so far as the females are concerned, minority is the test whether the intervention of a guardian is necessary or not and with the Shafiis the test is whether a girl is a maiden or tayyiba The difference between the two schools on this point, though not perhaps of much practical significance, involves a question of principle. The Hanafis allege that the Shafiis' refusal to acknowledge the right of a maiden of full age to contract marriage of her own will amounts to a breach of a cardinal principle of Muhammadan Law, namely, that the legal status of grown up female is as complete as that of a male."

Having regard to the marginal heading of the paragraph "The capacity to enter into a marriage contract" it is possible to argue, as contended for by the respondent, that, in the opinion of this learned writer also, under the Shafi Law the consent of the woman who is an adult virgin is as essential as under the Hanafi Law to validate her marriage though she is not competent to express that consent except through a wali.

Hassan Kutti Beary v. Jamabha. Madhavan Nair, J.

It seems to me that, having regard to the nature of the marriage relationship as understood in Muhammadan Law, the difference between the two schools, the Hanafi and the Shafi, on the point under consideration is not so very fundamental as is made to appear from the text-books. Marriage in Muhammadan Law is purely a civil contract, and if so, the consent must be considered a necessary element to give validity to the marriage. In the opening paragraph of the judgment in *Asgur Ali Chowdhry* v. *Muhubbut Ali*[2] which was a case in which the husband of a Muhammadan woman sued his father-in-law for damages when the marriage was found invalid, Markby, J. says :

"After the marriage, the plaintiff instituted a suit for the purpose of compelling the girl to live with him as his wife, but failed by reason of its being established that the girl was of full age, and that she had not given her consent."

We do not know what law governed the parties and there is no further reference in the judgment to this question of consent as the case dealt with quite a different matter. After stating,

"No contract can be said to be complete unless the contracting parties understand its nature and mutually consent to it,'

Mr. Amir Ali points out the distinction between the Hanafi and the Shafi Law thus :

"Among the Shafis and Malikis, although the consent of the *adult virgin* woman is as essential as among the Hanafis and the Shiahs to the validity of a contract of marriage entered into on her behalf, she cannot contract herself in marriage without the intervention of a wali. Among the Shafis, a woman cannot personally consent to the marriage. The presence of the wali or guardian is essentially necessary to give validity to the contract The wali's intervention is required by the Shafis and the Malikis to supplement the presumed incapacity of the woman to understand the nature of the contract, to settle the terms and other matters of similar import, and to guard the girl from being victimised by an unscrupulous adventurer or from marrying a person morally or socially unfitted for her."

It appears to me therefore that the consent of an adult virgin even among the Shafi sect is essential for the validity of a marriage and that the only difference between the Hanafi Law and the Shafi Law on this point is that under the Shafi Law the consent must be expressed through a wali and not direct. Even according to the "Minhaj," which has been strongly relied upon by the appellant as being a book upon Shafi Law, it is always commendable to consult the woman as to her future husband. The desirability of adopting this course is suggested by Sir R. Wilson

---

2. (1874) 22 W.R. 403.

also. Having regard to the conception of marriage as a contract in the Muhammadan Law, I think Mr. Amir, Ali's explanation of the difference between the Hanafi and the Shafi Law should be accepted as correct : and therefore it follows that in this case the marriage of the plaintiff with the defendant should be held invalid as her father had not secured her consent for it. This view is certainly more equitable and more suitable to modern times.

Hassan Kutti Beary v. Jaldabha

Madhavan Nair, J.

I would therefore dismiss this Second Appeal with costs.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice* AND MR. JUSTICE PAKENHAM WALSH.

Kidambi Sambamurthi Aiyar .. *Appellant* (Petitioner-15th Creditor)*

v.

E. Ramakrishna Aiyar and others .. *Respondents (Respts.-Insolvts.).*

Sambamurthi Aiyar v. Ramakrishna Aiyar.

Provincial Insolvency Act (V of 1920), Ss. 4, 27 and 75 (1)—Order granting extension of time to apply for discharge—Second appeal

An order granting an extension of the time during which to apply for discharge under section 27 of the Provincial Insolvency Act is not a decision under section 4 of the Act and, consequently, a second appeal does not lie from such an order under the second proviso to section 75 (1) of the Act.

Appeal under clause 15 of the Letters Patent against the judgment of the Honourable Mr. Justice Jackson, dated 28th June, 1927 and passed A.A.A.O. No. 120 of 1927, preferred to the High Court against the order of the District Court of Madura, dated 16th February, 1927, in C.M.A. No. 201 of 1926 preferred against the order of the Court of the Subordinate Judge of Dindigul, dated 7th August, 1926 in M.P. No. 223 of 1925 in I.P. No. 21 of 1922.

K. V. Sesha Aiyangar for *V. C. Seshachiarir* for appellant.

T. S. Anantharama Aiyar for respondents.

The judgment of the Court was delivered by

Pakenham Walsh, J.

Pakenham Walsh, J.—This is an appeal against the judgment of Jackson, J., in appeal against the order of the District Court of Madura in C. M. A. No. 201 of 1926, which was preferred against the order of the Subordinate Judge of Dindigul, dated 7th August, 1926 in M. P.

---

*L.P.A. No. 183 of 1927. 13th September, 1928.

Sambamurthi Aiyar v. Ramakrishna Aiyar. — Pakenham Walsh, J.

No. 223 of 1925. The original order granted an extension of the time during which to apply for discharge under section 27 of the Provincial Insolvency Act. On appeal to the District Court this order was reversed. The appeal against the order of the District Court is laid to the High Court. Mr. Justice Jackson held that no appeal lay evidently under section 75 (2). Section 75 (2) runs as follows:

"Any such person aggrieved by any such decision or order of a District Court as is specified in Schedule I, come to or made otherwise than in appeal from an order made by a Subordinate Court, may appeal to the High Court."

This order is one made under Schedule I and quite obviously on the terms of this section there is no second appeal in the matter. It has been sought however to argue from the second proviso to section 75 (1) that the order can be taken to be one under section 4 of the Act and a second appeal lies against any order passed under section 4 on a question of law. To say that this order is passed under section 4 amounts to saying that every order under the Act can be brought under section 4 and that therefore a second appeal lies on a question of law against every order passed under the Act. That is to render the schedule and the plain proviso of section 75 (2) meaningless. A sort of analogy was sought to be drawn from the Civil Procedure Code, but that does not in our opinion apply. There is nothing in the decisions quoted in that analogy which renders one part of that Act inconsistent with another, whereas the effect here is to wipe out a definite proviso as to appeal. It is a settled principle of construction that an Act must be construed, if possible, consistently with itself. We therefore find against the contention and dismiss the appeal with costs.

N.S. *Appeal dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

ORDINARY ORIGINAL CIVIL JURISDICTION.

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE REILLY.

F. B. — Narayanaswami Naicker v. Sakharam Rao.

A. V. Narayanaswami Naicker .. *Plaintiff**

v.

Sakharam Rao and others .. *Defendants.*

Original Side Rules (Madras), Order 6, Rule 4—Suit dismissed under —Application for restoration of, made after 30 days fixed by proviso to

*C. S. No. 38 of 1928. 4th October, 1928.

F. B.

Narayanaswami Naicker v. Sakharam Rao.

Order 6, Rule 4—Grant of—Discretion of Master as to—Order 1, Rule 7 of Original Side Rules—Effect.

Order 1, Rule 7 of the Original Side Rules gives a discretion to the Court to revive a suit, even after the expiration of the time delimited for the taking of a particular step in it.

The Master has a discretion, under Order 1, Rule 7 of the Original Side Rules, to restore a suit dismissed for default under Order 6, Rule 4 of those rules, even where the application for restoration is made after the expiry of the 30 days fixed by the Proviso to Order 6, Rule 4.

Kumaraswami Sastri, J.

The Court (Kumaraswami Sastri, J.) made the following

ORDER OF REFERENCE. This is an appeal against the order of the Acting Master dismissing the plaintiff's application to set aside the order of dismissal of the suit for default against defendants 1 and 7 and to restore the suit as against them.

The suit against defendants 1 and 7 was dismissed by the Second Assistant Registrar on the 23rd April, 1928. The order runs as follows:

"This suit coming on this day before this Court in the list of default causes for orders under Order 6, Rule 4, of the Original Side Rules, 1927, upon reading the plaint filed herein on the 18th day of January, 1928, it is ordered that this suit as against defendants Nos. 1 and 7 do, for default of prosecution, stand dismissed out of this Court."

Under the rules of 1927 every suit entered in the list of default causes is allowed to stand there for three weeks and, if nothing is done in the meantime, it is automatically dismissed and the order is drawn up. There is no notice given to the parties.

Rule 4 of Order 6 (which corresponds to Rule 54 of the old rules) under which this suit was dismissed runs as follows:

"Unless otherwise ordered, after a case has stood in the list of default causes for three weeks, the suit shall stand dismissed for default of prosecution as against the defendant in respect of whom default has been made.

Provided that the plaintiff may, within 30 days from the date of the dismissal, apply by Master's summons that the suit may be restored, and thereupon the master may take such order as he thinks fit. Notice of the application shall be given to all parties who have filed a written statement."

The plaintiff applied on the 24th of July, 1928 before the Master in Chambers that the order of dismissal of the suit for default against defendants 1 and 7 may be set aside and the suit restored. To this, Counsel for defendants 2 to 4 endorsed his consent. The matter came on before the Master on the 27th of July and it was dismissed, the Master holding that the application was barred by time. The order runs as follows :

F. B.

Narayanaswami Naicker v. Sakharam Rao.

Kumaraswami Sastri, J.

"For the reasons given in Master's order, dated 21st February, 1928, in C.S. No. 586 of 1926 with which I agree and which was upheld by the Judge (Waller, J.) in appeal, I must dismiss the application. I do not think that the consent of the other side could extend the period of 30 days fixed by Order 6, Rule 4 within which the application for restoration should be made."

It is argued for the plaintiff who is appealing against this order that the learned Master was wrong in holding that he had no discretion in the matter and that he was bound to dismiss an application for restoration if not made within 30 days.

The main grounds urged are that this case does not fall under Art. 163 of the Limitation Act and that Order 1, Rule 7 gives ample power to extend the time even though the period within which the application is to be made has expired. O. 1, R. 7 runs as follows:

"The Court or the Master shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act, or taking any proceeding, upon such terms, if any, as the justice of the case may require; and any such enlargement may be ordered, although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that when the time for filing or delivering any pleading or document, or filing any affidavit, answer or document, or doing any act, is or has been fixed or limited by any of these rules or by any direction on or under a summons for directions or by any order of the Court or Master, the costs of any application to extend such time and of any order made thereon, shall be borne by the party making such application unless the Court or Master shall otherwise order"

It is argued that the rule is clear and that in cases governed by the Original Side Rules an extension of time can be granted even though the period within which the application is to be made had elapsed.

Order 1, Rule 7 corresponds to Order 64, Rule 7 of the Supreme Court Rules which runs as follows:

"The Court or a Judge shall have power to enlarge or abridge the time appointed by these rules, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that when the time for delivering any pleading or document or filing any affidavit, answer or document, or doing any act is or has been fixed or limited by any of these rules, or by any direction on or under the summons for directions, or by any order of the Court or a Judge, the costs of any application to extend such time and of any order made thereon shall be borne by the party making such application unless the Court or a Judge shall otherwise order."

Under this rule it was held by North, J., in *The Script Phonography Co., Ltd.* v. *Gregg*[1] that when an order has been made dismissing an action, an application to extend the time cannot be made after the expiry of the period fixed by the rules within which the application is to be made. North, J., following *Whistler* v. *Hancock*[2] and *King* v. *Davenport*,[3] observed as follows:

"The Court cannot, after the action is gone, entertain an application the result of which would be to set it on foot again. The time for delivering the statement of claim expired on the 17th of December, 1889. The summons to extend the time was not returnable till the 18th of December, and under these circumstances the application was too late, and I have no jurisdiction to extend the time."

The same learned Judge in *Walker* v. *James*[4] was of opinion that when an action was dismissed for the non-appearance of the plaintiff, an application made on behalf of the plaintiff to restore the action after the expiry of the time fixed by O. 36, R. 33 cannot be granted by virtue of the provisions of O. 27, R. 15. The learned Judge observed:

"I do not think the power conferred by that order can be regarded as independent of the limit of time for making the application imposed by Order 36, Rule 33. I must act strictly on that rule, and therefore refuse the motion with costs."

This view in the earlier cases however has not been followed in the later decisions. In *Schafer* v. *Blyth*[5] it was held that the Court had discretion to enlarge the time fixed by O. 36, R. 33 which provides that any verdict or judgment obtained where one party does not appear at the trial may be set aside by the Court or a Judge * * * upon an application made within 6 days after the trial. The learned Judge (Lush, J.) followed *Bradshaw* v. *Warlow*[6] and dissented from *Walker* v. *James*[4] and observed:

"Counsel for the plaintiff has taken the preliminary objection that the application is not made within 6 days after the trial as required by Order 36, Rule 33 (1) and that I have no power to enlarge the time for making it. In support of the objection he relies on *Walker* v. *James* [(1885) 53 L.T. (N S.) 597.]. In that case, where the circumstances were similar to those of the present case, North, J., did no doubt hold that it was imperative that the application should be made within the time appointed by the rule, and that the Court had no power to enlarge the time, and if that decision is binding upon me I should have to dismiss the application.

1. (1890) 59 L.J.Ch. 406. 2. (1878) 3 Q.B.D. 83.
3. (1879) 4 Q.B.D. 402. 4. (1885) 53 L.T. (N S) 597.
5. (1920) 3 K.B. 140: 89 L.J. (K.B.) 671.
6. (1886) 32 Ch. D. 403.

F. B.
Narayanaswami Naicker v. Sakharam Rao.
Kumaraswami Sastri, J.

Unless it is binding upon me, I should, however, be slow to follow it, because personally I do not take the same view as was taken by North, J. It cannot, I think, have been intended that the period of 6 days appointed by the rule should in every case be treated as a fixed period incapable of extension, inasmuch as a litigant might be absolutely prevented by illness or an accident, or other circumstances, from making an application within the 6 days, and in that case a grave injustice might be worked if he was debarred from making the application at a later date On consideration, I think that the decision of North, J., is not binding upon me. The same point in substance came before the Court of Appeal in *Bradshaw* v. *Warlow* [(1886) 32 Ch. D. 403] It is true that it was Order 33, Rule 21 or the Rules of the Palatine Court of Lancaster which was there under consideration, but the language of that rule is substantially identical with that of the rule now in question In that case *Walker* v. *James* [(1885) L T (N.S) 597] was cited, but the Court of Appeal took the view that the Court had power to enlarge the time so as to admit of the application being made to the Court on the first practicable day after the expiration of the 6 days. That decision of the Court of Appeal seems to me to be in conflict with *Walker* v. *James* [(1885) 53 L.T. (N S) 597] and therefore impliedly to disapprove it."

The order of the Master in C.S. No. 586 of 1926 referred to by the Acting Master related to a case which was dismissed for default of payment of the first day's hearing fee which under O. 43, R. 4 is payable within 14 days from the date on which issues were settled. The suit was entered in the list of default causes under O. 6, R. 3 (*d*) and was dismissed under O. 6, R. 4. An application was made to restore the suit after 30 days had expired. An application was also made to excuse the delay in filing the application and to extend the time under O. 1, R. 7. Mr. White, the Master, held that the application was not one under Art. 163 of the Limitation Act and that the Court had no power to extend the time and relied on *The Script Phonography Co., Ltd.* v. *Gregg,*[1] *Whistler* v. *Hancock*[2] and *King* v. *Davenport.*[3]

An appeal was preferred against this order and it came on before Waller, J. and the learned Judge passed the following order:

> "I think that the Master's order is right and that he had no power to extend the time under Order 1, Rule 7 of the Original Side Rules. The appeal is dismissed with costs."

It is unfortunate that the subsequent decisions where the cases referred to by Mr. White have been overruled were not brought to the notice of the Master or the learned Judge. It

1 (1890) 59 L.J.Ch 406. 2. (1878) 3 Q.B.D. 83.
3. (1879) 4 Q.B.D. 402.

F. B.

Narayanaswami Naicker v. Sakharam Rao.

Kumaraswami Sastri J.

seems to me that O. 1, R. 7 gives ample discretion to the Court to extend the time even in cases where the time has expired.

Section 5 of the Limitation Act gives similar powers in the case of appeals and applications made under the Act. Section 148 of the Civil Procedure Code also gives the Court power to extend time even after the expiry of the time fixed.

I think that the view taken by the Master in C.S. No. 586 of 1926 and by Waller, J., on appeal therefrom which as I said before was based on the earlier decisions which have not been followed is erroneous.

As this question has arisen in several cases and the matter is of considerable importance to the practitioners and suitors, I think an authoritative ruling by a Bench is desirable. I direct that this matter be placed before the Honourable the Chief Justice for orders.

K. S. Krishnaswami Aiyangar and *P. V. Subramaniam* for plaintiff.

Defendants not represented.

The judgment of the Court was delivered by

Coutts Trotter, C. J.

Chief Justice.—Under the provisions of Order 6, Rule 4 of the Original Side Rules of this Court, this case, having been in the list of default cases for three weeks, stood dismissed. The proviso to that rule allows the plaintiff within 30 days of the date of dismissal to apply by Master's summons to have the suit restored and thereupon the Master has a discretion to restore it or not as he thinks fit. That proviso was not availed of by the plaintiff in this case and he took no steps within 30 days. The Master held that in those circumstances he had no discretion to allow the case to be restored after those 30 days. It is pointed out that by Order 1, Rule 7, which is in effect a reproduction of that which appears as Order 64, Rule 7 of the Rules of the Supreme Court in England, and which repeats similar rules which had been in force for many years, there is a general discretion given to revive a suit, because it says in terms that an enlargement may be ordered although the application for the same was not made until after the expiration of the time appointed or allowed. We have been referred to a series of English cases, the earliest of which is *Whistler* v. *Hancock*,[2] a decision of Chief Justice Cockburn and Mr. Justice Manisty. There an order was made dismissing an action for want of prosecution unless a statement of claim should be delivered within a week.

2. (1878) 3 Q.B.D. 83.

F. B

Narayanaswami Naicker v. Sakharam Rao.

Coutts Trotter. C. J

The week expired and nothing was done and it was held that the action was at an end. A similar conclusion was arrived at in *King* v. *Davenport*,[3] a decision of Chief Justice Cockburn and Mr. Justice Mellor, but it has been held that this case only applied to a state of things were an extension was sought to do something in the action after the action was dead. Thus it was decided in *Schafer* v. *Blyth*[5] that the general words of the rule covered a case where it was sought not to extend the time for taking a particular step in a case that had automatically come to an end but to revive the whole case itself and that the words of the rule gave a discretion to that effect. And in so deciding, Mr. Justice Lush was following a decision of the Court of Appeal, *Bradshaw* v. *Warlow*.[6] It is quite obvious that the draftsman of the Madras rules went for guidance to the English rule and no doubt was familiar with these decisions. We think that it must be taken that the intention of the framers of the rules which are made under the statute—and it is not suggested that they are *ultra vires* of the statute—was to give a discretion to the Court to revive a suit, even after the expiration of the time delimited for the taking of a particular step in it. The learned Master here held that he had no discretion, and that he was bound by the terms of Order 6, Rule 4, to decline to entertain any application or exercise any discretion with regard to its revival. We think that this cannot be upheld and we propose to remit the case to the learned Judge with this intimation of our opinion. He will probably send it back to the Master with a direction that he should consider the application on its merits and that his discretion on the merits is unfettered by any supposed rule of law.

A.S.V. — *Case remitted.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE MACKAY.

F. B.

The Commissioner of Income-tax, Madras v. Karuppiah Kangani.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

Karuppiah Kangani *alias* Kumaravelu Ambalam .. *Respondent.*

Indian Income-tax Act (XI of 1922), sections 3 and 4 (2)—Amount to be taxed—Income of year previous to the year of assessment—Material

*O.P. Nos. 130, 131 and 132 of 1928. 19th September, 1928.

3. (1879) 4 Q.B.D. 402. 5. (1920) 3 K.B. 140; 89 L.J. (K.B.) 671,
6. (1886) 32 Ch. D. 403.

date for residence in British India—"Resident in British India"—Meaning of—First wife and children of assessee living in his house at Ceylon—Second wife and children living in his house at native village in British India—Assessee carrying on business at Ceylon but visiting his native village frequently—Assessee physically present in native village when profits accrued in Ceylon but not physically present there when remittances were received or during the year of assessment—Effect

F. B.

The Commissioner of Income-tax, Madras v. Karuppiah Kangani.

Under the Indian Income-tax Act (XI of 1922) the income of the year previous to the year of assessment is not to be taken as merely a guide to the ascertainment of the income of the year of assessment but as the actual sum which is subject to taxation.

In re Behari Lal Mullick, (1927) I L.R 54 Cal. 630 approved

The material date at which an assessee should be "resident" in British India under section 4 (2) of the Income-tax Act is the date when the profits and gains sought to be taxed accrued to the assessee outside British India.

Where an assessee who was a native of a village in British India migrated to Ceylon many years ago, carried on business there and owned estates and a house on one of the estates where his first wife and her children lived, but had also another house in his native village in which his second wife and her children lived as well as lands in the vicinity and carried on money-lending in the village on a limited scale through a local agent, and it appeared that he frequently visited this native village of his and he was physically present in his village at the time when the profits sought to be taxed accrued in Ceylon, though not physically present there at the time when the remittances were sent from Ceylon to British India or during the year of assessment.

Held, that the assessee could properly be described as "residing" within British India at the date when the profits accrued to him in Ceylon under section 4 (2) of the Income-tax Act.

Case stated by the Commissioner of Income-tax, Madras, is as follows:—

1. I have the honour to refer the following case for the opinion of the Honourable the Judges of the High Court under S. 66 (2) of the Income-tax Act, XI of 1922.

2. The applicant is a native of Kakkattiruppupudur in the Ramnad District within the jurisdiction of the Income-tax Officer, Karaikudi (Second Circle).

3. He migrated to Ceylon many years ago and he now owns tea estates and factories and carries on money-lending and other businesses there. He has a house on one of his estates and his wife and children reside there.

4. He has a second house at Kakkattiruppupudur, in which his second wife and his children by her are living. He has lands in the neighbourhood and he carries on money-lending business there on a small scale. Up to the year 1924-1925 he frequently visited his native village. His last visit was one of about two months in the period August to October, 1924.

F. B.

The Commissioner of Income-tax, Madras v. Karuppiah Kangani.

5. For the year 1926-1927 the Income-tax Officer, Karaikudi, assessed him on an estimated income of Rs. 60,400 under S. 23 (4) of the Income-tax Act for failure to file a return of his income and produce his accounts. He re-opened the assessment under S. 27 on an application presented by Ramanuja Aiyangar, authorised agent of the present applicant. The agent filed a return of income showing an income of Rs. 1,890 from local money-lending. In a memorandum appended to the return he stated that the applicant being a resident of Ceylon was not liable to be taxed on profits derived from his business in Ceylon and remitted by him to British India. The Income-tax Officer held that the applicant was a resident of Kakkattirupupudur though he had a second residence in Ceylon. On an examination of the accounts the Income-tax Officer found that the applicant had the following profits at his disposal:

		Rs.
Money-lending and other business		
1922-23	..	7,450
1923-24	..	18,505
1924-25	..	12,219
		38,174
Tea		
1924-25	..	92,264
Total	..	1,30,438

Out of this a sum of Rs. 51,639 had been taxed in the assessment of the year 1925-1926. The balance of profits that accrued to the applicant at Ceylon during the years 1922-1923 and 1924-1925 and available for remittance during the year of account 1925-1926 amounted to Rs. 78,799. The accounts showed that the applicant had received a sum of Rs. 4,798 in British India in that year. The Income-tax Officer held that the applicant had received that sum from out of those profits and assessed him on an income of Rs 7,088 made up as follows:—

			Rs.
Property	..		400
Business—			
Kakkattiruppupudur	..	1,890	
Ceylon profits remitted to British India	..	4,798	6,688
		—	7,088

F B

The Commissioner of Income-tax, Madras v. Karuppiah Kangani.

6. On appeal the Assistant Commissioner agreed with the Income-tax Officer that the applicant was liable to be taxed on his foreign profits remitted to this country, but reduced the assessment under head "Property" from Rs. 400 to Rs. 200.

7. The applicant has required me to state a case to the High Court and refer certain questions of law which he alleges to arise out of the Assistant Commissioner's order. I think that the only question of law that arises is the following and I refer it for the decision of the High Court:

"Whether in the circumstances of this case the sum of Rs. 4,798 can be lawfully taxed under the provisions of sub-section 2 of section 4 of the Indian Income-tax Act as having accrued and arisen without British India to a person resident in British India."

8. It is contended on behalf of the applicant that having been assessed through an agent under S. 40 on the ground of non-residence, he cannot be treated in the assessment as a "person resident in British India" within the meaning of S. 4, sub-section (2). The facts (*i*) that the applicant was residing out of British India when the assessment was made upon him, and (*ii*) that he was resident in British India when the profits accrued and arose, appear to be a sufficient answer to this charge of inconsistency.

9. Section 3 of the Income-tax Act, (read with the annual Finance Act), imposes a tax on the income, profits and gains of the previous year of every individual. By sub-section (1) of section 4, the Act is made applicable subject to certain expenditure to all income, profits and gains accruing or arising or received in British India or deemed under the provisions of the Act to accrue or arise or to be received in British India. The tax is therefore payable on all income accruing or arising or deemed to accrue or arise in British India or not. Under sub-section (2) of section 4, the profits and gains of a business accruing and arising without British India to a person resident in British India are, if they are received in or brought into British India within three years of the end of the year in which they accrued or arose, deemed to have accrued or arisen in British India and to be profits and gains of the year in which they are so received or brought. This clause does not require, as the applicant contends, that the assessee should be resident in British India at the time of assessment or during the year of remittance. It requires such residence only during the period in which the profits accrued. The profits that have been asses-

F. B.

The Commissioner of Income-tax, Madras v. Karuppiah Kangani.

set in the present case accrued during the three years 1922-1923 1923-1924 and 1924-1925 and it is not disputed that the assessee was resident in British India during those years. I am therefore of opinion that the sum of Rs. 4,798 was rightly taxed under sub-section (2) of section 4.

M. Patanjali Sastri, for petitioner.

V. V. Srinivasa Aiyangar and *K. E. Rajagopalachari* for respondent.

The judgment of the Court was delivered by

Mackay, J.

Mackay, J.—These are three references made by the Commissioner of Income-tax under Section 66 (2) of the Income-tax Act (XI of 1922), at the instance of an assessee, Karuppiah Kangani *alias* Kumaravelu Ambalam.

The assessee is a native of the village of Kakkattiruppupudur in the District of Ramnad. He migrated to Ceylon many years ago and prospered. He now owns tea estates and factories in that Island and carries on money-lending and other forms of business in the Colony. He owns a house on one of the estates and there his first wife and her children live.

He has a second house in his native village in which his second wife and his children by her live. He has land in the vicinity and carries on money-lending in that village on a limited scale; and he has a local agent to conduct his affairs. Up to the year 1924-1925, he frequently visited Kakkattiruppupudur, his last visit at that period being from August to October, 1924. His next visit was in October, 1927, and it would appear that from that date he continued to reside there until the date of the reference in O. P. No. 131 of 1928, 11th April, 1928.

The common question of law referred for adjudication is whether in the circumstances of these cases the assessee can be lawfully taxed under the provisions of sub-section (2) of S. 4 of the Income-tax Act, in respect of three different sums as having accrued or arisen as profits and gains of a business without British India to a person resident in British India. These sums were, in O. P. No. 130 of 1928, Rs. 21,639 (or perhaps more accurately, Rs. 51,639); in O.P. No. 132 of 1928 Rs. 4,798; and in O.P. No. 131 of 1928, Rs. 62,291.

We agree with the decision in *In re Behari Lal Mullick*[1] that, under the Indian Income-tax Act, XI of 1922, the income

1. (1927) I.L.R. 54 C. 630.

F. B.

The Commissioner of Income-tax, Madras
v.
Karuppiah Kangani.

Mackay, J.

of the year previous to the year of assessment is not to be taken as merely a guide to the ascertainment of the income of the year of assessment, but as the actual sum which is subject to taxation. This seems clear on the language of section 3 of the Indian Income-tax Act, XI of 1922, and differentiates the cases under the Indian Act from those under the English Act, so that *Brown's case*[2] is not an authority that binds us.

In O.P. No. 130 of 1928, the profits and gains sought to be taxed accrued or arose outside British India, during the periods of 1922-1923, 1923-1924 and 1924-1925 when the assessee resided at different times in British India; the profits and gains were remitted to British India in 1924-1925 during which period he was resident therein; the year of assessment was 1925-1926 when he was not resident.

In O.P. No. 132 of 1928, the profits and gains accrued or arose outside British India in 1922-1923, 1923-1924 and 1924-1925 when the assessee was resident in British India as stated above; they were received in British India in 1925-1926 when he was not resident; the year of assessment was 1926-1927, when also he was not resident.

In O.P. No. 131 of 1928, the profits and gains accrued or arose outside British India in 1924-1925 when the assessee was for part of the period physically resident in British India; they were received in British India in 1926-1927 when he was not so resident; the year of assessment was 1927-1928 when he was so resident.

That brings the question we have to decide down to this short point : Was the assessee a resident within the meaning of the statute in British India at the material dates which we think must be taken to be the dates when the profits and gains sought to be taxed accrued to the assessee in Ceylon [Income-tax Act, XI of 1922, S. 4 (2)]. There can be no doubt as to what the answer must be: in all the three cases before us he was physically present in British India at the time when the profits sought to be taxed accrued in Ceylon, though in two of the cases he was not physically present in British India when the remittances were received, and in two similarly he was not physically present during the year of assessment. But we entertain no doubt that he could properly be described as "residing" here: he owned a house in the Ramnad District, where

2. (1921) 2 A.C. 222.

F. B.

The Commissioner of Income-tax, Madras v. Karuppiah Kangani.

his second wife and her children by him lived and he stayed in that house whenever he came to British India. The assessee will pay the costs of these references Rs. 250 consolidated for all three.

N. S. *Reference answered against the assessee.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[Ordinary Original Civil Jurisdiction.]

PRESENT:—SIR MURRAY COUTTS TROTTER, *Kt., Chief Justice,* MR. JUSTICE BEASLEY AND MR. JUSTICE MACKAY.

The Commissioner of Income-tax, Madras .. *Petitioner**

v.

T. P. Pethaperumal Chettiar .. *Respondent.*

F. B.

The Commissioner of Income-tax, Madras v. Pethaperuma Chetti.

Income-tax Act (XI of 1922), S. 10 (2) (iii)—Loan on "tavanai" system—Interest payable on—Deduction in respect of—Assessee's right to—Tavanai periods ending in year of account—Tavanai periods ending in previous years—Distinction.

In order to claim an allowance in respect of interest paid on borrowed capital it must be interest paid during the year of account. It may be interest actually paid in cash which is the cash basis of accounting or it may be by adjustment which is the mercantile basis of accounting. It does not matter what method is adopted, because the whole question depends upon what the arrangement was between the assessee and the persons who advanced the money at the time of its advance.

Where the money upon which the interest is due to be paid was advanced to the assessee on what is known as the "tavanai" system, the assessee is entitled to a deduction of interest in respect of the "tavanai" periods ending in the year of account. But he is not entitled to such a deduction in respect of the "tavanai" periods ended not in the year of account but in the year previous to it.

Loans on the "tavanai" system, explained.

Case stated by the Commissioner of Income-tax, Madras,

1. I have the honour to refer the following case for the opinion of the Honourable the Judges of the High Court under Section 66 (2) of the Indian Income-tax Act, 1922.

2. The applicant is a Nattukkottai Chetti residing at Shanmuganathapuram in the Ramnad District, within the juris-

---

*O.P. No. 129 of 1928. 19th September, 1928.

diction of the Income-tax Officer, First Circle, Karaikudi. He has rubber gardens and money-lending business at Taiping in the Federated Malay States.

3. In the year Krodhana (1925-1926) he received a sum of Rs. 55,423 in British India from his business at Taiping, and in the course of the assessment proceedings of 1926-1927 the question arose whether this sum, or any part of it, represented profit of the Taiping business liable to tax under S. 4 (2) of the Act.

4. The Income-tax Officer examined the accounts of that business, computed the profits for the year of account Krodhana (13th April, 1925 to 12th April 1926) to be $22,820 or Rs. 35,257 and taxed this sum as profit remitted to British India. In computing the profits he disallowed a sum of $13,301 claimed as expenditure of the year in the following circumstances.

5. The applicant had borrowed money from certain Nattukkottai Chetti firms and the accounts showed that these loans had been taken on "three months *tavanai*." In the course of the year Krodhana four of these *tavanai* periods terminated and the total amount of interest that fell due on these four occasions was $9,272. This sum the Income-tax Officer allowed as a deduction. But the applicant claimed in addition the above sum of $13,301 consisting of interest which had fallen due on the expiry of previous *tavanai*, periods. The Income-tax Officer held that this interest must, in view of the character of the loans, be regarded as having been paid in previous years, and could not be treated as expenditure of the year, Krodhana. This decision was confirmed on appeal by the Assistant Commissioner. A copy of his order is appended (Exhibit A).

6. In the accounts maintained by the applicant the whole sum of $22,573 is adjusted as having been paid to the creditors in the year Krodhana. Corresponding entries showing receipts of the interest were made in the accounts of some of the creditors. It is admitted that these entries are not a record of cash payments. But the applicant claims that they prove an agreement between him and his creditors to pay and receive the whole of the accumulated interest in the year Krodhana and that there was in consequence a constructive payment of the whole sum in that year.

7. The accounts of the applicant have not been systematically maintained on any recognised basis, but the Assistant

F. B.

The Commissioner of Income-tax, Madras v. Pethaperumal Chetti.

Commissioner has found that they are maintained on the mercantile system so far as these transactions are concerned. This finding is an inference from the nature of the loans themselves.

8. The applicant has required me under section 66 (2) of the Income-tax Act to refer certain questions of law for the decision of the High Court. The question arising for decision upon the above facts is the following and I refer it for the opinion of the High Court:

"Whether the sum of $13,301 is allowable in this case as a deduction under section 10 (2) (iii) of the Income-tax Act as interest paid in the year Krodhana".

9. The clause referred to allows as a deduction in respect of borrowed capital "the amount of the interest paid"; and in sub-section (3) we are informed that the word "paid" means "actually paid or incurred according to the method of accounting upon the basis of which the profits or gains are computed under this section." The applicant claims that his accounts are maintained according to what is known as the cash system; in other words, that entries are made therein only when there is an actual payment or receipt of money. This is not entirely accurate is clear from a passage in the appellate order passed by the Assistant Commissioner which I quote. "The Income-tax Officer reports that the appellant has not been following any regular system of accounting and that in some cases he (the appellant) has paid interest in cash without calculating and crediting the amount of interest in the account books and that in some others interest has been calculated and credited in the account books without any cash having been paid". In the light of these facts it is hardly unfair to hold that the applicant has followed no regular system of accounting, and that in view of this the Income-tax Officer was entitled to exercise the discretion vested in him by S. 13 of the Act. He cannot be said to have exercised that discretion unreasonably in refusing to allow more than one year's interest. On that view of the case no question of law would, I submit, arise. This was not, however, the ground taken by the Assistant Commissioner and I proceed accordingly to deal with the question of law which undoubtedly arises out of his order on the appeal.

10. It is not disputed that the loans interest on which is claimed as a deduction were advanced to the applicant on what is known as the *tavanai* system. *Tavanai* means a period of rest, and the distinguishing feature of such loans is that at the close

F. B.

The Commissioner of Income-tax, Madras v. Pethaperumal Chetti.

of each period (in this case a period of three months) the interest due, if payment in cash has not been demanded by the creditor, is added on to the principal sum lent, and becomes merged in it, and begins to bear interest as part of such principal. The High Court of Madras has held in *Narayanan Chetty* v. *Suppiah Chetty*[1] that the amount thus added to the principal at the end of the *tavanai* period ceases subsequently to be "money payable for interest" within the meaning of Article 63 of the Limitation Act, but it has in fact become an increment to the deposit. When a loan of this kind is made, therefore, there is an implied agreement between debtor and creditor that the interest due shall be regarded as paid at the close of each period and lent again to the debtor. These payments of interest should be exhibited as such even in an account maintained on a cash basis, *i.e.*, as a record of actual receipts and disbursement. The fact that the debtor and the creditors did not in this case make the necessary adjustments in their accounts at the end of each *tavanai* but made them subsequently cannot, I think, alter the real nature of the transaction or give rise to any inference that the payment was made at such subsequent time contrary to the terms of the original agreement. The sum of $13,301 represented interest for *tavanais* prior to the year of account and must be taken to have been paid as it fell due. I am therefore of opinion that the Income-tax Officer was right in not allowing it as a charge against the profits of the year of account.

M. Patanjali Sastri for The Commissioner of Income-tax.

R. Kesava Aiyangar for respondent.

The judgment of the Court was delivered by

Beasley, J.

Beasley, J.—The question referred to us by the Commissioner of Income-tax, Madras, is "whether the sum of 13,301 dollars is allowable in this case as a deduction under S. 10 (2) (*iii*) of the Income-tax Act as interest paid in the year Krodhana." Under section 10 profits and gains of a business carried on by an assessee are to be computed after making certain allowances and sub-clause (*iii*) allows the deductions of interest paid in respect of capital borrowed for the purposes of the business. The assessee is a Nattukkottai Chetty residing in the Ramnad District and has rubber gardens and a money-lending business at Taiping in the Federated Malay States. In the year

1. (1920) I.L.R. 43 M 639: 38 M.L.J. 437.

F. B.

The Commissioner of Income-tax, Madras v. Pethaperumal Chetti.

Beasley J.

Krodhana (1925-1926) he received a sum of Rs. 55,423 in British India from his business at Taiping and in the course of the assessment proceedings of 1926-1927 the question arose whether this sum, or any part of it, represented profit of the Taiping business liable to tax under Section 4 (2) of the Indian Income-tax Act. The Income-tax Officer examined the accounts of the Taiping business and computed the profits for the year of account, Krodhana (13th April, 1925 to 12th April, 1926) to be 22,820 dollars and taxed this sum as profit remitted to British India. The assessee claimed an allowance of 22,573 dollars as expenditure in the business for that year and under the following circumstances. The assessee had borrowed money from certain Nattukkottai Chetty firms and the accounts showed that these loans had been taken on "three months *tavanai*" and this is conceded by the assessee. In the course of the year of account, four of these *tavanai* periods terminated and the total amount of interest that fell due on those four occasions was 9,272 dollars. This sum the Income-tax Officer allowed as a deduction, but the assessee claimed in addition the sum of 13,301 dollars which represented the interest which had fallen due on the expiry of previous *tavanai* periods. It is admitted that those *tavanai* periods expired in previous years or at any rate in the year previous to the year of account. The Income-tax Officer held that this interest, in view of the fact that these were *tavanai* loans, must be regarded as having been paid in previous years and could not be treated as expenditure of the year of account. He accordingly disallowed the assessee's claim with regard to 13,301 dollars. In the accounts maintained by the assessee the whole of the sum of 22,573 dollars which represents the interest due on the expiry of all *tavanai* periods including those of the previous years is adjusted as having been paid to the lenders in the year of account. Corresponding entries showing the receipt of interest were made in the accounts of some of the lenders. It is admitted that these entries are not a record of cash payments but they are used by the assessee to prove an agreement between him and his lenders to pay and receive the whole of the accumulated interest of the previous years in the year of account and that there was in consequence a constructive payment of the whole sum in that year. We think it is perfectly clear that in order to claim an allowance in respect of interest paid on borrowed capital it must be interest paid during the year of account. It may be interest actually paid in cash which is the cash basis of ac-

F. B

The Commissioner of Income-tax, Madras v. Pethaperumal Chetti.

Beasley, J.

counting or it may be by adjustment which is the mercantile basis of accounting. No regular basis of accounting seems to have been adopted by the assessee but in any case, in our view, it does not matter what method was adopted because the whole question depends upon what the arrangement was between the assessee and the persons who advanced the money at the time of its advance. It is conceded that the money upon which the interest was due to be paid was advanced to the assessee on what is known as the *tavanai* system; and the learned Commissioner in his reference to us states as follows :

> "*Tavanai* means a period of rest, and the distinguishing feature of such loans is that at the close of each period (in this case a period of three months) the interest due, if payment in cash has not been demanded by the creditor, is added on to the principal sum lent, and becomes merged in it, and begins to bear interest as part of such principal "

In *Narayanan Chetty* v. *Suppiah Chetty*[1] it was held that such an arrangement as this is a deposit and when the interest is not demanded, the interest is to be added to the deposit as an increase to the deposit. That means that the interest though not demanded is to be treated as paid and received and is to be added to the deposit itself to carry interest. The Income-tax Officer, has therefore treated the interest due to the end of these *tavanai* periods as interest paid and he has adopted the same principle for both the years previous to the year of account and the year of account itself and has given the assessee the deduction allowable in respect of the *tavanai* periods ending in the year of account. But since the *tavanai* periods in respect of which the assessee claims the allowance of 13,301 dollars ended not in the year of account but in the year previous to it, it must be taken similarly that the interest was paid by the assessee in that previous year and added to the principal and therefore not having been paid in the year of account the Income-tax Officer was quite correct in disallowing the assessee's claim.

For these reasons we answer the question referred to us in the negative.

The Commissioner on this reference will get his costs, *viz.*, Rs. 250.

N.S. *Question answered in the negative.*

---

1. (1920) I.L.R. 43 M. 639: 38 M.L.J. 437.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE PAKENHAM WALSH.

Yelamanchili Pitchayya .. *Appellant** (*Plff.*)

v.

Yelamanchili Rattamma and another .. *Respondents* (*Defts.*).

Pitchayya v. Rattamma.

Civil Procedure Code (V of 1908), O 1, R. 10—Suit on mortgage by benamidar—Power of Court to make the real owner a party—Distinction between benamidar and trustee.

The Court has got power, under Order 1, Rule 10 of the Civil Procedure Code, to make the real owner a party to a suit on a mortgage brought by the benamidar in his own name.

A benamidar is not a trustee in the strict sense of the term. He has the ostensible title to the property standing in his name but the property does not vest in him but is vested in the real owner.

Distinction between a benamidar and a trustee pointed out

Appeal against the decree of the Court of the Subordinate Judge of Masulipatam, dated 10th November, 1923 in O.S. No. 26 of 1922.

A. Krishnaswami Aiyar and *Ch. Raghava Rao* for appellant.

S. Varadachariar and *N. Rama Rao* for respondents.

The Court delivered the following

JUDGMENT.—The plaintiff has preferred this appeal against the decree of the Subordinate Judge of Masulipatam dismissing his suit on a mortgage-deed executed by the 1st defendant. The plaintiff's case is that he lent Rs. 1,750 on the mortgage of property belonging to the 1st defendant, a Hindu widow, and that she did not pay anything towards the mortgage amount and that he is entitled to a decree against her. The 1st defendant's case is that the money lent on the mortgage belonged to Kottayya, her sister's husband, and that the plaintiff is only a benamidar and is not entitled to a decree against her. Kottayya applied to the Court to be made a party to the suit and the Subordinate Judge directed him to be added as the 2nd defendant to the action. Kottayya's case is that the plaintiff is a benamidar for him and that he paid Rs. 1,750 for the plaint mortgage and the plaintiff, therefore, is not entitled to a decree. The Subordinate Judge upheld the contention of the 2nd defendant and dismissed the suit. Hence this appeal.

The first contention of Mr. Krishnaswami Aiyar for the appellant is that the Lower Court had no power to make the

*Appeal No. 217 of 1924. 24th Septemper, 1928.

Pitchayya v. Rattamma.

2nd defendant a party to a suit on a mortgage and to try the question whether the mortgagee is a benamidar for some one else. His argument is that, granting that the plaintiff is a benamidar, he is a trustee and the *cestui que trust* or the beneficial owner cannot intervene in a suit in which the trustee is seeking to enforce a legal remedy against a third person in respect of the trust property and that Order 1, Rule 10 of the Civil Procedure Code has no application to a case like the present. When a person acquires an interest in property with his funds in the name of another for his own benefit the latter is called a benamidar. A benamidar is not a trustee in the strict sense of the term. He has the ostensible title to the property standing in his name but the property does not vest in him but is vested in the real owner. He is only a name-lender or an *alias* for the real owner. The cardinal distinction between a trustee as known to English Law and a benamidar lies in the fact that a trustee is the legal owner of the property standing in his name and the *cestui que trust* is only a beneficial owner, whereas, in the case of a benami transaction, the real owner has got the legal title though the property is in the name of the benamidar. It is well settled that the real owner could enforce his remedy in respect of property standing in the name of a benamidar without reference to the latter. If a mortgage stands in the name of a benamidar, the person for whom the mortgage was obtained could sue on the mortgage, and the same rule applies to other transactions except those forbidden by law. The benamidar has some of the liabilities of a trustee but not all his rights. When the benamidar is in possession of the property standing in the name, he is in a sense the trustee for the real owner. It is well settled now that a benamidar can sue in his own name. He can give a discharge to an obligor, who, not knowing the real nature of the transaction, *bona fide* pays him the amount due from him. The benamidar incurs no obligation if he does not protect the property standing in his name. A trustee is liable for neglect in safeguarding the interests of the trust by not taking reasonable care with it such as a prudent man would bestow in his own affairs, but I am not aware of any case in which a mere benamidar was held liable for failure to sue for recovery of money due on a bond standing in his name. A benamidar has no interest at all in the property or transaction standing in his name. If a contract is entered into in his name, he is not the contracting party. *Bipeen Beharee Chowdhry* v.

Pitchayya v. Rattamma.

Ramchunder Roy and others.[1] In *Petheperumal Chetti* v. *Muniandy Servai*[2] Lord Atkinson quotes with approval the following passage from Mayne's Hindu Law, 7th Edition, para. 446:—

"Where a transaction is once made out to be a mere *benami,* it is evident that the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested."

A benami transaction does not create the relation of trustee and *cestui que trust.* See *Uma Sundari Dasi* v. *Dwarakanath Roy,*[3] A person dealing with a benamidar *bona fide* without the knowledge of the real nature of the transaction would be protected on the principle of the law of estoppel. As the real owner held out to the world that the benamidar was the real owner, he could not complain if other people *bona fide* dealt with the owner of the ostensible title as the real owner. The principle is embodied in section 41 of the Transfer of Property Act.

Mr. Krishnaswami Aiyar relied strongly upon *Vaitheswara Aiyar* v. *Srinivasa Raghava Aiyangar*[4] as supporting his contention that the benamidar is a trustee in the full sense of the term. What was decided in that case was that a benamidar could sue to enforce the mortgage standing in his name and that the real mortgagee need not be a party. There was a conflict of opinion as to the right of a benamidar to sue in his own name and a Full Bench of this Court following the decision in *Chowdhry Gur Narayan* v. *Sheolal Singh*[5] held that a benamidar could sue on a mortgage standing in his name. In *Chowdhry Gur Narayan* v. *Sheolal Singh*[5] it was held by the Privy Council that

"an action could be maintained in the name of the *benamidar* in respect of the property though the beneficial owner is not a party to it."

Mr. Krishnaswami Aiyar's argument is that as the benamidar could sue in his own name, it is not open to the Court to make the real owner a party to the action. The cases in *Vaitheswara Aiyar* v. *Srinivasa Raghava Aiyangar*[4] and *Gur Narayan* v. *Sheolal Singh*[5] do not support his contention. They only decided that a benamidar could bring a suit in his own name without making the real owner a party. But a Court could make the real owner a party if it thinks that his presence is necessary for the proper determination of the suit. In a

1. (1870) 14 W.R. 12, 15.
2. (1908) I.L.R. 35 Cal. 551: L.R. 35 I.A. 98: 18 M.L.J. 277 (P.C.).
3. (1868) 2 Beng. L R. (App Civil) 284.
4. (1919) I.L.R. 42 Mad. 348: 36 M.L.J. 296 (F.B.).
5. (1918) I.L.R. 46 Cal. 566: L.R. 46 I.A. 1: 36 M.L.J. 68 (P.C.).

Pitchayya v. Rattamma.

case where the obligor pleads that he paid what was due from him to the real owner, the benamidar would be bound by such payment and if he brings a suit ignoring the payment, the defendant could ask the Court to make the real owner a party. Where a benamidar brings a suit the result of which is likely to prejudice the right of the real owner, the Court is not debarred from making the real owner a party. Order 1, Rule 10 gives a discretion to the Court to order

"that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added."

In *Gur Narayan* v. *Sheolal Singh*,[5] relied upon by the appellant, their Lordships observed:

"It was open to him (meaning the real owner) to apply to be joined in the action, but, whether or not he is made a party, a proceeding by or against his representative is in its ultimate result fully binding on him."

It is to the interest of the real owner to protect his rights when he thinks that the action of the benamidar might prejudice him. As the benamidar is only an *alias* for the real owner, the real owner could always step in and say that he is the person who is entitled to the property or contract standing in the name of the benamidar. The Lower Court was justified in making the 2nd defendant a party in the circumstances of the case and we find against the appellant on this point.

[The remaining portion of the judgment is omitted as it is not material for the purpose of this report.—REP.]

The appeal fails and is dismissed with costs.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Sankarambody Vijiaraghavachariar .. *Appellant** (*Plff.*)

v.

Ramanujachariar (died) and others .. *Respondents* (*Defts.*)

Vijiaraghavachariar v. Ramanujachariar.

Hindu Law—Widow—Surrender—Alienation by widow—Subsequent surrender—Validity.

Where a Hindu widow, having effected certain alienations of her husband's property, afterwards purported to surrender the whole of her estate in favour of the reversioner,

---

*S.A. No. 611 of 1925. 26th April, 1928.

5. (1918) I.L.R. 46 Cal. 566: L.R. 46 I.A. 1: 36 M.L.J. 68 (P.C.).

Vijiaraghavachariar v. Ramanujachariar.

Held, that she did not, and could not surrender the whole of her husband's estate so as to efface herself entirely as the previous alienations were her own act and she could not get rid of them, and that, therefore, the surrender was invalid.

Sakharam Bala v. *Thama,* (1927) I.L.R. 51 Bom. 1019 approved.

Rangaswami Goundan v. *Nachiappa Goundan,* (1918) L.R. 46 I.A. 72: I.L.R. 42 Mad. 523: 36 M.L.J. 493 (P.C) referred to.

Second appeal against the decree of the District Court of North Arcot in A.S. No. 362 of 1923 preferred against the decree of the Court of the District Munsif of Arni in O.S. No. 418 of 1922.

C. S. Venkatachariar, A. C. Sampath Aiyangar, V. C. Rajagopalachariar and *V. S. Govindachariar* for appellant.

K. Bhashyam Aiyangar for respondents.

The Court delivered the following

JUDGMENT.—In this case the widow, having effected certain alienations of her husband's property of which one was held not to be for necessity and consequently not binding on the reversion, afterwards purported to surrender the whole of her estate in favour of the reversioner. As pointed out by the Privy Council in *Rangaswami Goundan* v. *Nachiappa Goundan,*[1] a surrender in order to be valid must be a surrender of the complete interest of the widow in the estate. And Lord Morris is quoted at page 532 as follows:

> "It may be accepted that, according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life-estate. It was essentially necessary to withdraw her own life-estate so that the whole estate should get vested at once in the grantee."

This doctrine was accepted in that case and explained by the further observation:

> "It is the effacement of the widow, an effacement which in other circumstances is effected by actual death or by civil death, which opens the estate of the deceased husband to his next heirs at that date. Now there cannot be a widow who is partly effaced and partly not so."

To apply this principle it is clear that when the widow purported to surrender her estate she did not and could not surrender the whole of her husband's estate so as to efface herself entirely. The previous alienations were her own act and she could not get rid of them. To that extent she was unable to surrender the whole of the estate and therefore the surrender which she purported to make is invalid. This is also the view taken in the decision in *Sakharam Bala* v. *Thama*[2] and there is

1. (1918) L.R. 46 I.A. 72: I.L.R. 42 M. 523: 36 M.L.J. 493 (P.C).
2. (1927) I.L.R. 51 B. 1019.

Vijiaraghavachariar v. Ramanuja chariar.

no reason whatever to take any other view in accordance with the doctrine laid down in *Rangaswami Gounden* v. *Nachiappa Goundan.*[1] Certain cases have been mentioned in which such a surrender has been acted upon, but the question whether it was a valid surrender or not was not raised and therefore those decisions are not authority in the present case. The contention that there is a residuary estate in the widow even after she has alienated the whole estate may or may not be correct. (Vide *Chidambaramma* v. *Hussainamma*[3]). It is quite immaterial in determining the validity of the surrender.

The appeal must therefore be allowed and the appeal remanded to the Lower Appellate Court for disposal on the other issues. Costs to abide the result. The Court-fee will be refunded to the appellant.

N.S. *Appeal allowed and case remanded to Lower Court.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE DEVADOSS AND MR. JUSTICE MACKAY.

Chinna Alagumperumal Karayalar .. *Appellant** (*1st Deft.*)

v.

Vinayagathammal and others .. *Respondents* (*Plff. 2 to 4 Defts.*).

Chinna Alagumperumal Karayalar v. Vinayagathammal.

Guardian—Minor widow—Preference of husband's sapindas to paternal relations—De facto *guardian—Actions which would constitute a person as a* de facto *guardian—Legal guardian treating another as guardian and taking a conveyance of the minor's property from him—Validity of the conveyance —Alienation by* de facto *guardian—When valid—Unauthorised or improper alienation by* de facto *guardian—Void or voidable—Amount spent by alienee to relieve the burden on the estate—Right to re-imbursement.*

The husband is the legal guardian of his minor wife and, if he happens to die during her minority, his nearest sapinda will be her guardian and not her paternal relations

A *de facto* guardian of a minor is one who looks after the property of the minor and generally acts in his interests for the time being. A fugitive or an isolated act of a person with regard to the minor's property would not make him a *de facto* guardian of the minor, nor would staying with the minor for a time make him a *de facto* guardian There must be a continuous course of conduct as guardian of the minor in regard to his property in order to enable him to become a *de facto* guardian. The

---

*Appeal No. 222 of 1924. 21st August, 1928

1 (1918) L.R. 46 I.A. 72: I.L.R. 42 M. 523: 36 M.L.J. 493 (P.C.),

3. (1915) I.L.R. 39 M. 565: 29 M.L.J. 546.

Chinna Alagumperumal Kariyalar v. Vinayagathammal.

length of the period required to constitute one a *de facto* guardian would depend upon the circumstances of each case.

Where a person died in March, 1915 leaving a minor widow and it did not appear from the evidence that the widow's mother did any act as guardian in respect of the property which the widow inherited from her husband before the date of her alienation of the property in June, 1915, though she happened to stay with her widowed daughter, but it appeared that the crops on the property were harvested by the divided step-brother of the deceased and the moveables and the cattle were also taken away by him,

Held, that the widow's mother did not become her *de facto* guardian before the date of her alienation of the property.

Harilal Ranchhod v. *Gordhan Keshav,* (1927) I.L.R. 51 Bom. 1040 referred to.

Where the legal guardian of a minor assumes the role of a guardian by taking possession of the minor's estate, he cannot afterwards treat any other person as guardian; and if he takes a conveyance of the minor's property in his favour from the mother of the minor who was not allowed to have anything to do with the minor's estate even for a short time, it is absolutely void.

Obiter: It is only in cases of necessity that the *de facto* guardian would be justified in selling any portion of the minor's property and the necessity must be very great in order to justify the sale of practically the whole of the property. An unauthorised or improper alienation of the minor's property by the *de facto* guardian is void and need not be set aside.

Where the entire properties of a minor worth Rs. 12,500 were sold by the *de facto* guardian for a consideration of Rs 10,000 to be paid to various creditors of the deceased without a pie being paid on the date of the sale, and Rs. 3,100 out of the debts was due on chit bonds which had to be paid only in the course of 8 years and Rs. 1,260 was due on *Othi* the period of redemption of which had not then expired, and there was no satisfactory evidence that any creditor made a demand or pressed for payment before the date of the sale, the sale cannot be binding on the minor.

In the case of a sale by the *de facto* guardian of a minor which is absolutely void, the vendee is not entitled to be paid the amount that he spent to relieve the burden on the estate as he is only a volunteer inasmuch as he has no title to the property.

Ram Tuhul Singh v. *Biseswar Lal Sahoo,* (1875) L.R. 2 I.A. 131 referred to.

A person who, knowing all the facts, gets a transfer of the minor's property from a person who is not the guardian is not entitled to be reimbursed any amount which he paid for the benefit of the minor.

Appeal against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in O.S. No. 49 of 1922.

S. Varadachariar and *S. Rajagopalachari* for appellant.

B. Sitarama Rao and *K. Venkateswaran* for respondent.

Chinna Alagum-perumal Karayaga- v. Vinayaga-thammal.

The Court delivered the following

JUDGMENT.—The suit is for a declaration that the sale of the plaint property to the 1st defendant by the plaintiff's mother during her minority is not binding on her and for its possession. The Subordinate Judge decreed the suit and the 1st defendant has preferred this appeal. The facts are these. One Muthukrishna Karayalar of Padmanabhamangalam village in Srivaikuntam Taluk, Tinnevelly District, died in March, 1915 leaving him surviving the plaintiff, his wife, a minor aged 15 years. On the 2nd June, 1915, the plaintiff's mother as protector and guardian of the plaintiff executed a sale-deed, Ex. XV, in favour of the 1st defendant, the divided step-brother of the plaintiff's husband, conveying all the properties inherited from the husband, except a small portion, for a consideration of Rs. 10,000 to be paid to various creditors including the 1st defendant. On the 15th June, 1915, the 1st defendant executed what is called an indemnity bond, but in reality a security bond, Ex. XXIX, in favour of the plaintiff's guardian, in which he made provision for the maintenance of the plaintiff out of the income of 94 cents of land and undertook to discharge her husband's debts and provided for her enjoying other property belonging to him in case any loss was caused to her by his not discharging the debts. The plaintiff attained majority in 1918 and filed this suit on the 23rd December, 1920 for setting aside the sale as not binding on her and for recovery of possession of the property conveyed under Ex. XV. The 1st defendant pleaded that, as the estate was heavily burdened with debt, it was necessary to sell the property and that he purchased it *bona fide* for adequate consideration from her guardian, and that the plaintiff, after attaining majority, ratified the sale, and that, in case the sale was set aside, he should be paid at least Rs. 12,000 being the amount that he spent to save the property from creditors and to effect improvements. The Additional Subordinate Judge of Tinnevelly found there was no justifiable necessity to sustain the validity of the sale and decreed the suit. He also found that the plaintiff did not ratify the sale and appellant's vakil did not argue the point.

The main question in this appeal is, is the sale evidenced by Ex. XV binding on the plaintiff? In order to answer this question satisfactorily two points have to be considered: (1) had the plaintiff's mother authority to bind the plaintiff by her acts in her capacity as guardian, and (2) if the first question is

Chinna Alagumperumal Karayalar v. Vinayagathammal.

answered in the affirmative, was the sale for purposes which would bind the plaintiff? The plaintiff was a minor aged 15 years at the time of her husband's death in March, 1915. The mother did not become the legal guardian after the death of the plaintiff's husband. According to Hindu Law, the 1st defendant, who is the elder step-brother of the plaintiff's husband, became her guardian on her husband's death. Trevelyan in his "Law relating to Minors" at page 53 says:

"After the husband's death, the guardianship of his minor widow, and the management of her property, devolve upon the husband's heirs, that is, upon those who are entitled to inherit his estate after her death in preference even to her own father"

and he relied upon a number of authorities for his statement. Mayne in paragraph 211 (page 277) of the 8th edition says:

"The husband's relations, if any exist within the degree of a sapinda, are the guardians of a minor widow in preference to her father and his relations."

In *Khudiram Mukherjee* v. *Bonwari Lal Roy* [1] Banerjee, J., observes:

"Now under the Hindu Law we think that the relations of her deceased husband are entitled to be the guardians of a Hindu widow in preference to her paternal relations. This is clear from the text of Narada, Chapter XIII, verses 28 and 29, cited in the Dayabhaga, Chapter XI, S. 1, para. 64.

The text runs thus:

"When the husband is deceased, his kin are the guardians of his childless widow. In the disposal of the property and care of herself as well as in her maintenance, they have full power. But if the husband's family be extinct, or contain no male, or be helpless, the kin of her own father are the guardians of the widow, if there be no relations of her husband within the degree of a sapinda."

This text has been followed in three cases, one to be found in Macnaghten's "Principles and Precedents of Hindu Law," Vol. II, p. 203; another *Kishen Mohan Mitter* v. *Khettermoni Dassi*[2] and a third the case of *Bai Kesar* v. *Bai Ganga*.[3] In *Bai Kesar* v. *Bai Ganga*[3] it was held

"A Hindu widow is the proper guardian of her deceased son's widow, in the absence of any person claiming a preferential title to succeed to the estate of the latter."[3]

The learned Judge who decided that case relied upon Grady's Hindu Law, page 65, quoting from Macnaghten's "Principles and Precedents of Hindu Law," page 104. The following passage is taken from West and Buhler, 3rd Ed., p. 232:

1. (1889) I.L.R. 16 C. 584.
2. 2 Hay 196: Marsh 313.
3. (1871) 8 Bom. H.C.R. (App. Civil) 31.

Chinna Alagumperumal Karayalar v. Vinayagathammal.

"The perpetual dependence assigned to a woman is accompanied by an indefeasible claim to nurture, shelter and gentle usage. Who are to satisfy this claim? Primarily the family she has joined not the family she has quitted."

At p. 541 the same learned editors say:

"Thus the right or duty of guardianship over a female is vested after marriage in the husband, his sons and his sapindas successively."

Macnaghten at page 104 of Vol. I of his book says:

"The guardianship of a female (whether she be a minor or adult) until she be disposed of in marriage rests with her father; if he be dead, with her nearest paternal relations. After her marriage a woman is subjected to the control of her husband's family. In the first instance, her husband is her guardian: in default of him, her sons, grandsons, and great-grandsons are competent to assume guardianship."

From these authorities it is clear that the husband is the legal guardian of his minor wife, and if he happens to die during her minority, his nearest sapinda will be her guardian. The text of Narada does not merely refer to the order of precedence as to guardianship but distinctly gives the right of guardianship to the husband's sapindas. It was held in *In the mattter of the Petition of Dhuromdhur Ghose*[4] that a father was guilty of kidnapping when he took his minor daughter away from the husband's guardianship. The husband becomes by marriage the legal guardian of his minor wife even though he himself may be a minor. By marriage, a girl passes into the family of her husband. Her husband's *gothra* thereafter becomes her *gothra* and her husband's sapindas become her sapindas as she becomes one with the husband. If she becomes a widow when a minor, it follows as a matter of course that the eldest among the nearest sapindas of her husband becomes her guardian. This is in consonance with the Hindu notion of the merger of the identity of the wife in the husband. The 1st defendant, on the death of his step-brother, Muthukrishna Karayalar, became the lawful guardian of the plaintiff.

The contention on the part of the 1st defendant is that the plaintiff's mother became her guardian *de facto*, and, as *de facto* guardian of a Hindu minor she had all the rights of a lawful guardian. We have to see whether the plaintiff's mother did become her *de facto* guardian. The plaintiff's husband died in March, 1915. Ex. XV was executed on the 2nd June, 1915. Did the plaintiff's mother manage the properties of the minor and look after her interests in such a way as to become her *de*

4. (1889) I.L.R. 17 C. 298.

Chinna Alagum perumal Karayalar v. Vinayagathammal.

facto guardian before the date of Ex. XV? Plaintiff's mother as P.W. 1 says that the 1st defendant harvested the crops on the lands belonging to Muthukrishna Karayalar at the time of his death and took possession of all the moveables, the cattle, plough-bulls, etc. The 1st defendant denies having harvested the crops, but, on the evidence, we are satisfied that it was he that harvested the crops on his step-brother's lands. Though he says that the tenant gave the produce of the land to P.W. 1, yet he is not able to say who the tenant was. The 1st defendant had his own cultivation and some of his lands were in close proximity to Muthukrishna's lands and some of them had not been divided by metes and bounds. He, however, admits that he took possession of the cattle and moveables. From the evidence on record, it does not appear that the plaintiff's mother did any act as guardian in respect of the property which the plaintiff inherited from her husband before the date of Ex. XV. A *de facto* guardian is one who looks after the property of the minor and generally acts in his interests for the time being. A fugitive or an isolated act of a person with regard to the minor's property would not make him a *de facto* guardian of the minor, nor would staying with a minor for a time make him a *de facto* guardian. There must be a continuous course of conduct as guardian of a minor in regard to his property in order to enable one to become a *de facto* guardian. The length of the period required to constitute one a *de facto* guardian would depend upon the circumstances of each case. The first act of intermeddling with the estate of a minor would not be the act of a *de facto* guardian, if he had not become one before the act, nor would the subsequent management of the estate of the minor by such person make the first act, which is one of alienation, the act of a *de facto* guardian. In this case, there is no evidence that the plaintiff's mother was allowed to manage the estate of the plaintiff before the date of Ex. XV. Reliance is placed by Mr. Varadachariar on Ex. XXIX as showing that the plaintiff's mother was her guardian. Ex. XXIX called an indemnity bond was executed on the 15th June, 1915 in favour of the plaintiff's mother as guardian of the plaintiff. This and Ex. XV formed parts of the same transaction. Ex. C is a receipt dated 28th December, 1915 granted for the moveables and cattle which the 1st defendant took possession of. These would not show that plaintiff's mother managed her estate in such a way as to become her *de facto* guardian. The 1st defendant's maternal uncle filed O.S. No. 145 of 1918 in the District Munsif's

Chinna Alagumperumal Karayalar v. Vinayagathammal.

Court of Srivaikuntam against the plaintiff making the mother her guardian *ad litem*. The acts of the 1st defendant and his maternal uncle treating the plaintiff's mother as guardian for their own purposes would not make her *de facto* guardian so as to enable her to bind the minor by her acts. In *Harilal Ranchhod* v. *Gordhan Keshav*[5] Marten, C. J., observes:

"Now it is not necessary for us in the present case to define what particular circumstances must exist before a person can be described as a '*de facto* guardian' or have such powers that may properly belong to a *de facto* guardian. But speaking for myself I think there must be some course of conduct in that capacity before a person can be described as a guardian *de facto*. I am not prepared to extend that expression to a guardian *ad hoc*."

Crump, J., observes at page 1047:

"I must admit that I am not precisely enamoured of the term '*de facto guardian*' because it appears to me to be debatable in the extreme and incapable of exact definition. I take it to mean, so far as it can be defined, a person who, being neither a legal guardian nor a guardian appointed by Court, takes it upon himself to assume the management of the property of the minor as though he were a guardian. But if that be the real meaning of the term, I agree with the learned Chief Justice that it implies some continuity of conduct, some management of the property beyond the isolated act of sale which comes into question in this suit."

The observations of Crump, J., apply with great force to this case. The plaintiff's mother was not allowed to manage the affairs of the plaintiff. The crops were harvested by the 1st defendant. The moveables and the cattle were taken away by him and there was nothing left for the plaintiff's mother to look after or manage under such circumstances. It will be doing violence to language to say that she became a *de facto* guardian merely because she happened to stay with her widowed minor daughter. We have therefore no hesitation in holding that the plaintiff's mother was not her *de facto* guardian.

The 1st defendant, as already found by us, was the guardian of the plaintiff. He not only had the legal right under the Hindu Law to be the plaintiff's guardian but his acts show that he assumed the role of a guardian. He harvested the crops standing on the land at the time of his step-brother's death, he took possession of the cattle and moveables and began to treat, according to his own evidence, with the creditors. When a person who is entitled to be the guardian takes possession of the estate of the minor, he exercises his right as guardian, and he cannot treat any other person as guardian when he himself is in

5. (1927) I.L.R. 51 B. 1040.

Chinna Alagumperumal Karayalar v. Vinayagathammal.

possession of the estate of the minor. The 1st defendant being the guardian of the plaintiff and acting as such by taking possession of her property, it would be opposed to natural justice if he be allowed to deprive the minor of all her property by getting a conveyance in his favour from the mother who was not allowed to have anything to do with the minor's estate even for a short time. The transaction evidenced by Ex. XV is absolutely void, as the plaintiff's mother was not her *de facto* guardian and as the vendee himself was the lawful guardian of the plaintiff.

This finding is sufficient to dispose of the appeal, but, as other points were argued at great length, we consider them briefly. Granting that the plaintiff's mother was a *de facto* guardian, the question is, was the sale for purposes which would bind the plaintiff? An elaborate argument was addressed to us by Mr. Varadachariar about the indebtedness of the estate of Muthukrishna. Ex. XV mentions as many as 26 items of debts of which items 1, 2 and 3 were due on hypothecation bonds executed for due payments of the instalments of chits. Items 4 to 6 were due on ordinary hypothecation bonds and items 7, 8 to 10 were *othi* debts, that is, debts due on usufructuary mortgages. Items 11 to 21 were due on pro-notes, items 22 and 23 were due on pledges, items 24 and 25 debts not secured by any instrument and item 26 was said to be due to the 1st defendant. Some of the items of debts are impeached by the plaintiff as not being due from the estate. Item 26 is a sum of Rs. 260 said to be due to the 1st defendant. There is no satisfactory evidence that any amount was due to the 1st defendant in respect of expenses incurred for repairs to a tank and for "having paid kist." The 1st defendant denies having paid kist and, even if he did pay the kist, it must have been out of the proceeds of the sale of crops which he harvested. Item 26 is clearly a fictitious item, evidently put in to make a round sum. Item 17, Rs. 645 is said to be due on a pro-note. D.W. 1 proves the execution of the note. Sudalimuthu Pillai, the promisee, has not been examined to prove that the 1st defendant discharged the debt. D.W. 1 simply proves the hand-writing of the plaintiff's husband. Item 16 is said to be due on a pro-note. D.W. 2 says he obtained an assignment of the note Ex. XXII, but there is no evidence of Muthukrishna's liability on the pro-note. Item 13 is Rs. 192 said to be due on a promissory note (Ex. XXXV). The promisee has not been called to prove the liability of Muthukrishna on the note.

Chinna Alagum-perumal Karayalar v. Vinayagathammal.

It is unnecessary to consider the rest of the items due on pro-notes and pledges in the view we take of the necessity for the sale. Of the debt of about Rs. 10,000, Rs. 1,260 was due on *othi* or usufructuary mortgages, items 7 to 10, and Rs. 3,100 was due on chit bonds, items 1, 2 and 3. The amount of debt carrying interest due from the estate at the time of Muthukrishna's death was Rs. 5,550 even if all items are true, of which Rs. 1,550 was secured on the hypothecations of immoveable property. Was there any pressure on the estate which would be relieved only by sale of the property? There is no satisfactory evidence that any creditor pressed for payment between the date of Muthukrishna's death and the date of Ex. XV. P.W. 1 was not specifically asked about any creditor pressing for immediate payment of any debt. D.W. 1, the maternal uncle of the 1st defendant, says: "I know some creditors who pressed for payment, Ramaswami Karayalar and Venkatachari, after plaintiff's husband died. The creditors complained to me also. Sokamayya Kone also demanded as above, also Kodayammal, wife of Venkatachari. He adds "these demands were a year after the death of plaintiff's husband." So, there is no satisfactory evidence that any demand was made by any of the creditors between the date of plaintiff's husband's death and the date of Ex. XV. That being so, was there any necessity for the sale of practically the whole of the minor's estate? It is only in case of necessity that the guardian would be justified in selling any portion of the minor's property and the necessity must be very great in order to justify the sale of practically the whole of the property. The chit subscriptions had to be paid in the course of 7 or 8 years. The *othi* debts had not to be paid till redemption was sought. The only debts that had to be paid if demanded were the pro-note debts and debts on pledge of jewels. In order to liquidate debts to the extent of Rs. 4,000 there was no necessity to sell property worth Rs. 14,000.

It is strongly urged by Mr. Sitarama Rao for the plaintiff that the property was sold for an inadequate price. The evidence on record is not definite enough to show what the actual price of the land conveyed under Ex. XV was. The lands in Agappattu, 6 acres 29 cents in extent, are said to be the best of the whole lot. The land in Tholappan Panai measuring 1 acre and 79 cents is also good land. The land in Panakkulam 10 acres 36 cents is not so valuable. There was in addition 95 acres of dry land. The witnesses give varying rates as prevailing at the time but we may take it that the valuation given in Ex. XXIX is a fairly approxi-

Chinna Alagum-perumal Karayalar v. Vinayaga-thammal.

mate one. In it all the lands belonging to Muthukrishna's estate are said to be worth Rs. 14,000. Excluding the 94 cents valued at Rs. 1,500, the rest of the lands was sold under Ex. XV. It follows that lands worth Rs. 12,500 were sold for a consideration of Rs. 10,000. Of this consideration, not a pie was paid on the date of the document. Rs. 3,100 due on the chit bonds had to be paid in the course of 8 years and Rs. 1,260 due on *othi* had not to be paid. Even now, two items of *othi* have not been redeemed. In these circumstances, the sale of practically the whole of the minor's estate cannot be a valid sale which would bind the minor.

It is not necessary in this view to consider at length whether the plaintiff's mother was coerced into executing Ex. XV. She wanted to manage her daughter's affairs and she was prevented from doing so by the 1st defendant taking possession of all the moveables, cattle and crops on the land and if he had insisted on her executing a sale-deed in his favour of practically the whole of the minor's estate before he provided for her maintenance and if the plaintiff's mother executed the document in order to get maintenance for her daughter, in law her act would be invalid as being brought about by coercion. There is no evidence as to the negotiations which led up to the sale P. W. 1, an ignorant shepherd woman, had not the time to know the state of her son-in-law's affairs. There is no evidence that she had any independent advice except that of her brother who was not a man of influence or education. If, in such circumstances, the daughter's husband's elder brother, who is a wealthy and influential man in the village, takes a document from the plaintiff's mother, the onus would be heavily on him to show that the transaction was above board, that the plaintiff's mother had independent advice, that she knew the condition of the estate and that there was actual pressure on the estate to relieve which she entered into the transaction. What appears to be the fact is that the friends of the 1st defendant at his request consented to handing over the whole of the minor's property into his possession. Though Ex. XV is attested by some respectable persons like Doraiswami Kone who could be said to be independent, they have not been called to show what necessitated the execution of Ex. XV. D.W. 1 is 1st defendant's father-in-law. D.Ws. 2 and 6 are not satisfactory witnesses. The conduct of the attestors can be explained on the ground of the feeling among the Hindus that a widow needs only a starvation allowance and that the husband's brother who is the rever-

Chinna Alagumperumal Karayalar v. Vinayagathammal.

sioner could not be prevented from entering into possession of the estate. Taking all the circumstances and the evidence into consideration, we hold that the sale was not justified by necessity, that the sale was not for an adequate consideration and that the plaintiff's mother did not know what she was doing. The sale therefore cannot bind the plaintiff.

The next point for consideration is whether the 1st defendant should be paid the amount of debt on the estate which he paid off. The 1st defendant contends that plaintiff is not entitled to mesne profits but that he is entitled to be paid the amount that he spent for the estate. Though he claimed Rs. 12,000 in his written statement, Mr. Varadachariar who appears for him claims only Rs. 9,000. If a sale is only voidable, it is good till it is avoided, but if it is void, it need not be avoided. Moreover, it has been held in several cases that the unauthorized or improper alienation of a minor's property by a *de facto* guardian need not be set aside. *Thayammal* v. *Kuppanna Goundan*,[6] *Balappa* v. *Chanbasappa*[7] and *Katha Perumal Thevan* v. *Ramalinga Thevan*.[8] As we have held that the sale is absolutely void, the 1st defendant is not entitled to be paid the amount that he spent to relieve the burden on the estate, as he was only a volunteer inasmuch as he had no title to the property. The observations of the Privy Council in *Ram Tuhul Singh* v. *Biseswar Lall Sahoo*[9] may be quoted in this connection:

"It is not in every case in which a man has benefited by the money of another, that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay." *See* also *Nathu* v. *Balwantrao* [(1903) I.L.R. 27 Bom. 390.]

In case it be held that the sale is only voidable, the question would arise whether the 1st defendant is entitled to be paid any amount and, if so, what amount. Several cases have been relied upon by both sides in respect of their respective contentions. In *Limbaji Ravji* v. *Rahi*[10] it was held that though the sale was by an unauthorized person, the Court might under S. 41 of the Specific Relief Act make it a condition that the minor should refund the amount by which his estate and himself were

---

6. (1914) I.L.R. 38 M. 1125: 27 M.L.J. 285
7. (1915) 17 Bom L.R. 1134.
8. (1914) 17 M.L.J. 138.
9. (1875) L.R. 2 I.A. 131: 23 W.R. 305 (P.C.).
10. (1925) I.L.R. 49 B. 576.

Chinna Alagumperumal Karayalar v. Vinayagathammal.

benefited. In that case, the sale was by the step-mother on behalf of her minor son. The Court held that the sale was by an authorized person and the sale was invalid and that the minor was entitled to have it set aside. Even though the step-mother was not the lawful guardian of her step-son, it is difficult to see how she could not have been his *de facto* guardian if by course of conduct she acted as such. The learned Judges found that she redeemed the mortgage and sold the land after redemption. With all respect to the learned Judges, we think that the step-mother was *de facto* guardian and it is well settled that the powers of a *de facto* guardian are the same as those of a lawful guardian under the Hindu Law. Vide *Ramaswami* v. *Kasinatha*,[11] *Thayammal* v. *Kuppanna Goundan*[6] and *Adhar Chandra* v. *Kirtibash Bairagee*.[12] Her alienation of the minor's property was only voidable and not void. A Court of Equity has power to grant relief in proper cases and, in the view of the learned Judges, it was a proper case for the application of S. 41 of the Specific Relief Act. A person who, knowing all the facts, gets a transfer of the minor's property from a person who is not the guardian, is not entitled to be reimbursed any amount which he paid for the benefit of the minor. It was held in *Harilal Ranchhod* v. *Gordhan Keshav* [5] that

> "a person who has made improvements on the property believing in good faith that he is absolutely entitled thereto, is entitled to the benefit of S. 51 of the Transfer of Property Act."

There was a distinct finding that the improvements were made in good faith. These two cases have no application to the present case as the 1st defendant's conduct has been throughout the very opposite of *bona fide*.

Granting that the 1st defendant is entitled in law to be paid some amount, let us see whether in fact he is entitled to be paid anything. He harvested the crops on the land belonging to Muthukrishna at the time of his death. The yield of the lands may be taken at 50 kottas of paddy per year. That would give us about Rs. 600 and the other income from the land is said to be Rs. 350 according to the plaint. Though the plaintiff's 2nd witness would make out that the income from the lands was considerably more and the 1st defendant would make out that the income from the lands was considerably less, we may strike

---

5. (1927) I.L.R. 51 B. 1040.
6. (1914) I.L.R. 38 M. 1125: 27 M.L.J. 285.
11. A.I.R. 1928 M. 226.
12. (1910) 12 C.L.J. 586.

Chinna Alagumperumal Karayalar v. Vinayagathammal

a mean and hold that the income from the lands must have been at least Rs. 800 or Rs. 900. This amount the 1st defendant had. He also took all the cattle and moveables. According to his valuation, they were worth Rs. 500. There is no satisfactory evidence that this amount was paid to the plaintiff's guardian. The 1st defendant says "I paid for the cattle, etc., Rs. 500. I executed a pro-note to a nominee of plaintiff's mother and then paid it. I hold the pro-note with me." He has not produced the pro-note and we are not prepared to believe his statement that he executed a pro-note for the amount. He must have had at least Rs. 900 the value of the yield of the land, and Rs. 500 the value of the cattle. He has not accounted for them. We have found that item 26 is a fictitious item. If credit is given for these items Rs. 900, 500 and 260 and amounting to over Rs. 1,600 the amount that would be required for paying off all the pro-notes even if genuine debts would be only about Rs. 2,400, which, together with the *othi* and chit subscriptions, could have been met from the income of the property as the Subordinate Judge remarks. Some of the debts have not been proved to be genuine debts. In these circumstances, the 1st defendant is not entitled to be reimbursed any portion of the amount which he is said to have paid for the benefit of the plaintiff's estate.

The plaintiff is entitled to mesne profits from the date of the Lower Court's decree which will be ascertained in execution.

In the result, the appeal is dismissed with costs.

N.S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE WALLACE AND MR. JUSTICE THIRUVENKATACHARIAR.

A. V. Balakrishna Menon, late Official Receiver, Calicut .. *Appellant* (1st Counter-petitioner)*

v.

Kakkat Manakkal Uma *alias* Pattanadi Andarjanam and others .. *Respondents (Petitioners and 2nd Counter-petitioners).*

Balakrishna Menon v. Kakkat Manakkal Uma.

Decree—Construction—Appeal by Official Receiver from a decree in an ordinary action—Dismissal of appeal with the direction that appellant do pay

---

*A.A.O. No. 408 of 1921. 31st August, 1928.

Balakrishna Menon v. Kakkat Manakkal Uma.

the respondents their costs—Costs, if can be recovered personally from the Official Receiver—Indemnity of Official Receiver—English practice—Practice in Madras and Calcutta High Courts—Executing Court—Duty of

Where an Appellate Court hearing an appeal preferred by an Official Receiver decreed "that the appellant do pay to respondents 1 to 6 Rs. 452-13-0 for their costs in opposing this appeal,"

Held, that the wording of the decree implied that the costs can be recovered from the Official Receiver personally.

Abdul Rahiman & Co. v. *Shaw Wallace & Co.* (1924) 21 L.W. 516 explained and dissented.

Per *Wallace, J.*—The English practice is that, when the case is in Bankruptcy, a simple order for costs against the Official Receiver will not imply that the Official Receiver must pay them personally. But, in the case of an ordinary action, a simple order for costs against the Official Receiver has the usual meaning of such an order against any litigant, and the party against whom it is made is personally liable in the first instance, though he may later on apply to the Bankruptcy Court and repay himself out of the estate or by enforcing any indemnity bond he may have against the creditors.

The practice in the Madras and Calcutta High Courts, even on the Insolvency Side, is to hold the Official Assignee in the first instance personally liable for costs.

Per *Thiruvenkatachariar, J.*—A Court which executes a decree has to execute it according to its terms and, if for that purpose it is called upon to construe the decree, it has to do so according to the plain meaning of the words of the decree. When the words to be construed are clear enough, the executing Court cannot attribute some other meaning to it unless it has to do so in virtue of any enactment or rule having the force of law applicable to the particular case before it.

The correct proceeding, in the case of the termination of an action unsuccessfully to the Official Receiver, is to make an order that the Official Receiver do pay his opponent's costs. Having protected himself by obtaining leave from the Court, the Official Receiver has got his right of indemnity, for what it is worth, against the assets of the estate, but if assets of the estate are insufficient to give a proper indemnity to him, he must, before starting the proceedings, approach the creditors or somebody and get guarantee or an indemnity from the people on whose behalf he is to act.

In re Suresh Chunder Gooyee and others, (1918) 23 C.W.N. 431 approved.

Appeal against the order of the District Court of South Malabar at Calicut, dated 19th July, 1927, in M.P. No. 619 of 1926.

K. Kuttikrishna Menon for appellant.

P. S. Narayanaswami Aiyar for respondents.

The Court delivered the following.

Wallace, J.

JUDGMENTS. *Wallace, J.*—On the 7th December, 1920, a Bench of this Court in A.S. No. 353 of 1919 between the Official

Balakrishna Menon v. Kakkat Manakkal Uma.

Wallace, J.

Receiver of South Malabar (Mr. A. V. Balakrishna Menon), the appellant and various respondents, decreed "that the appellant do pay to respondents 1 to 6 Rs. 452-13-6 for their costs in opposing this appeal." The short point for decision in this C.M.A. is whether or not the wording of that decree has to be taken to imply that the costs can be recovered from Mr. Balakrishna Menon personally. The Lower Court has held that it does so imply and Mr. Menon appeals. He contends that such phrasing in the decree against the Official Receiver *ex-officio* implies that unless the Court directs otherwise he shall not be personally liable. The respondents contend that where the Court has not said that the costs will come only out of the insolvent's estate in the hands of the Official Receiver, the Official Receiver is personally liable for the costs.

Admittedly, Mr. Balakrishna Menon was no longer holding the office of Official Receiver when the present execution petition in which execution has issued against him personally was put in. The suit itself was filed in 1917 against the predecessor in office of Mr. Menon. It was by members of a tarwad to declare that certain property included in the schedule of their insolvent karnavan was not his property but the property of the tarwad. While the suit was pending, Mr. Menon in 1918 came into charge of the Office of the Official Receiver and continued the defence in the suit. The suit was eventually decreed with costs against the Official Receiver. He, *i.e.*, Mr. Menon, preferred an appeal to the High Court which was dismissed also, the decree giving the direction noted above as to costs. Mr. Menon ceased to be Official Receiver in January, 1925. There are no funds in the insolvent's estate to meet this decree for costs and the decree-holder seeks to execute it against Mr. Menon himself.

Now there can be no doubt that the Official Receiver or a trustee in bankruptcy may, like any ordinary litigant, be ordered to pay costs in any action taken or defended by him. See *John Tweedle & Co., Ltd., In re,*[1] *Arthur Williams & Co., In re. The Official Receiver, ex parte*[2] and *James Bevis* v. *C. A. Turner.*[3] The question here is what did the Court intend when it baldly said that he shall pay costs. As the Court has not specifically stated its intention we have to be guided by the general principles of law. The law in England is thus stated in Halsbury,

1. (1910) 2 K.B. 697. 2. (1913) 2 K.B. 88.
3. (1883) I.L.R. 7 B. 484.

Balakrishna Menon v. Kakkat Manakkal Uma.

Wallace, J.

Bankruptcy and Insolvency, para. 176 under the sub-heading 'Official Receiver':

"The Official Receiver is not personally liable for costs, when being trustee, he is sued as representing the debtor's estate, or when made a party to any cause or matter on the application of another party, unless the Court otherwise directs."

And again under the sub-heading 'Trustees,' para. 218:

"He, (*i.e.*, a trustee appointed to fill the office of trustee of the property of a bankrupt and not the Official Receiver) is in general personally liable for all costs incurred in the course of litigation instituted by him or against him, save where an action is brought against him as representing the estate, or he is made a party to any cause on the application of any other party thereto, and the Court does not direct that he shall be liable."

And again in paragraph 230:

"Where a trustee brings or defends an action as a litigant, he is as between himself and the other parties to the action like any other litigant; that is to say, he must pay any debt, damages, or costs which the other litigants recover against him out of his own pocket, and get re-imbursement if entitled to it, out of the bankrupt's property."

The first two propositions are founded upon Rule 108 (3) of the rules framed under the Bankruptcy Act of 1883, and the last proposition is quoted from *Ex parte Angerstein: In re Angerstein*.[4] R. 108 (3) of the Bankruptcy Rules is now Rule 96 (3) under the present Bankruptcy Act of 1914 which lays down that where an action is brought against an Official Receiver or a trustee in bankruptcy as representing the estate of a debtor, or where the Official Receiver or trustee is made a party to a cause or matter, on the application of any other party thereto, he shall not be personally liable for costs unless the Court otherwise directs. Now it has to be borne in mind that the word "Court" in these Bankruptcy Rules is, by virtue of Rule 3, the Court as defined by the Bankruptcy Act, unless the context or subject-matter otherwise requires, *i.e.*, a Court having jurisdiction in bankruptcy under the Act; in other words, as we would say in this country, the Insolvency Court. *See* observations of Peterson, J., in *Hill* v. *Cooke Hill*.[5] There is nothing so far as I can see in the context or subject-matter of Rule 96 or the old Rule 108 to render that definition of 'Court' inapplicable to the word 'Court' in the rule. It is highly improbable that under a Rule framed under a special Act the Legislature intended to exempt particular officials or persons from the operation of the ordinary Civil Law. So that the rule only carries us as far as this,

4. (1874) 9 Ch. App. 479.
5. (1916) W.N. 61 (Eng.).

Balakrishna Menon v. Kakkat Manikkal Uma.

Wallace, J.

namely, that in actions against an Official Receiver, etc., he shall not be personally liable, unless the Insolvency Court otherwise directs, *i.e.*, in the insolvency relation, if the phrase may be used, between the Official Receiver and the insolvent's estate, the Insolvency Court will not direct that the costs come out of the pocket of the Official Receiver and not out of the estate except by a special order. It is to matters in insolvency that these rules have been applied. See the case reported in *In re W. H. Wilkinson, Ex parte The Official Receiver,*[6] *In re Glanville, Ex parte The Trustees,*[7] *In re Bryant, Ex parte Gordon,*[8] and *In re Agriculturist Cattle Insurance Co., Ex parte Official Manager.*[9] But as to any order which the Ordinary Civil Court may pass in the matter of costs in an ordinary action against the Official Receiver, these rules seem to have no application. It follows that in a case like the present in which we are concerned with a decree in an ordinary action, a party mulcted in costs is personally liable for those costs, and the Official Receiver is therefore under the decree in question personally liable for the costs. It is open to him to apply to the Insolvency Court for an order that he may reimburse himself out of the estate. It may even be open to him to reimburse himself out of the estate without an order of the Court, and, as between himself and the estate, he shall not be liable for costs unless the Insolvency Court by a specific order so directs.

This view is the effect of the rulings in *Ex parte Angerstein: In re Angerstein*[4] and *Pitt* v. *La Fontaine.*[10] The former was a case in bankruptcy, the latter an ordinary civil action. It is true, as the appellant points out, that both these were cases not of the Official Trustee but of a trustee appointed by the creditors, but that really makes no difference in principle. The bankruptcy rules quoted above place both on the same footing. In fact in *Ex parte Angerstein: In re Angerstein,*[4] Sir G. Mellish, L. J., said: I see no difference between the case of an Official Liquidator and a trustee in bankruptcy." Similarly, in *Pitt* v. *La Fontaine*[10] a plea which rested on section 20 of the Bankruptcy Act of 1869 was rejected on the ground that that section does not mean that the trustee under that Act cannot be made personally liable for costs in an ordinary action. *Mackensie In re Hertfordshire (Sheriff of), ex parte*[11] is to the

4. (1874) 9 Ch. App. 479.
6 (1884) 1 Morr. Bank. Cas. 65.
7. (1885) 2 Morr. Bank. Cas. 71.
8. (1889) 6 Morr. Bank. Cas. 262.
9. (1874) 10 Ch. App. 586.
10. (1880) L.R. 6 App Cas. 482.
11 (1899) 2 Q.B. 566.

Balakrishna Menon v. Kakkat Mamakkal Uma. — Wallace, J.

same effect. On the other hand, the case relied on by the appellant, namely, *In re Galey, Ex parte Cundy*[12] is a case in the Insolvency Court, which makes all the difference. There it was held that an order of the Insolvency Court that the Official Receiver must also pay the costs of this appeal did not mean that he was to pay them personally thus fulfilling the intention of Rule 96 or old Rule 108 that the Official Receiver shall not be liable unless the Court so directs. The appellant also relies on the ruling in *Abdul Rahiman & Co.* v. *Shaw Wallace & Co.*[13] There the learned Judge was only interpreting his own decree, which is a simple matter compared with the task of this Bench to interpret the decree of another Bench. It was obviously within the discretion of the learned Judge to pass any order he chose as to who should pay costs in the action which went before him and he chose that the Official Assignee should not in that case be personally mulcted in costs. In *Borneman* v. *Wilson*,[14] a case of a trustee in Bankruptcy electing to continue an action, Bowen, L.J., laid down on the matter of costs that "he cannot adopt part of the action and leave out the rest" and Fry, L J., said the same.

The English practice therefore is that when the case is in bankruptcy, a simple order for costs will not imply that the Official Receiver must pay them personally, because of Rule 96. But in the case of an ordinary action, a simple order for costs against the Official Receiver has the usual meaning of such an order against any litigant, and the party against whom it is made is personably liable in the first instance, though he may later on apply to the Bankruptcy Court and repay himself out of the estate or by enforcing any indemnity bond he may have against the creditors.

In this Presidency, we have not even a rule corresponding to Rule 96. The practice in this High Court and in the Calcutta High Court, even on the Insolvency Side, appears to me to hold the Official Assignee in the first instance personally liable for costs. (*In re Suresh Chunder Gooyee and others*[15] and *In re Abdul Rahiman Sahib & Co.*[16]) I can therefore see no ground for holding that the learned Judges who passed this order intended to depart from the usual practice that an un-

10. (1880) L.R. 6 App. Cas. 482.
12 (1890) 7 Morr Bank. Cas. 253.
13. (1924) 21 L.W. 516.
14. (1884) 28 Ch. D. 53.
15. (1918) 23 C.W.N. 431.
16. (1926) I.L.R. 51 M. 308 at 317: 55 M.L.J. 12.

Balakrishna Menon v. Kakkat Manakkal Uma. — Thiruvenkatachariar J.

successful litigant in an ordinary civil action shall be personally liable for costs.

Thiruvenkatachariar, J.—I am of the same opinion and I wish to add a few words with reference to some of the contentions which were pressed on us by the appellant's Advocate.

I may at the outset observe that a Court which executes a decree has to execute it according to its terms, and if for that purpose it is called upon to construe the decree, it has to do so according to the plain meaning of the words of the decree. When the words to be construed are clear enough, the executing Court cannot attribute some other meaning to it unless it has to do so in virtue of any enactment or rule having the force of law applicable to the particular case before it. In the present case, the decree sought to be executed is a decree for costs passed by a Bench of this Court against the appellant in an appeal preferred by him against a decree of the District Court of South Malabar. The decree in which the appellant is described as the Official Receiver, South Malabar (Mr. A. V. Balakrishna Menon) directs that the appellant "do pay to respondents Nos. 1 to 6 Rs. 452-13-6 for their costs in opposing this appeal." According to its plain meaning the decree is executable against the appellant in any manner in which a decree for money may be executed against any ordinary litigant who is directed to pay costs. But the appellant's Advocate contends that as the appellant filed the appeal in his capacity as Official Receiver it could not have been the intention of the Court to make him personally liable for costs and that the decree should be construed as limited to execution out of the assets of the estate which he represented in that litigation. The learned Advocate has not referred us to any enactment or rule by force of which a decree against an Official Receiver should be so construed, corresponding to the rules framed under the English Bankruptcy rules, but he contends that when an official sues or is sued in an official capacity it must be presumed that the decree does not affect him personally and that otherwise it will be imposing such a heavy responsibility upon Official Receivers that few persons would be willing to accept that office.

He further contends that when the Official Receiver files the suit or appeal or defends the same with the leave of the Court obtained under section 53 of the Provincial Insolvency Act, he must be deemed to have acted *bona fide* and cannot be held personally liable for any decree which may be pass-

Balakrishna Menon v. Kakkat Manakkal Uma. — Thiruvenkatachariar, J.

ed against him. The remedy of the opposite party in those cases is only against the estate unless the decree itself makes his personal liability clear.

No authorities were cited in support of these contentions. On the other hand, the only Indian authorities directly bearing on the question to which we have been referred go against these contentions. See *James Bevis* v. *C. A. Turner*,[3] which purports to follow the view taken by the Privy Council in *Pitt* v. *La Fontaine*[10] and by the Court of Appel in *Ex parte Angerstein: In re Angerstein*,[4] as regards the liability of the Official Trustee in Bankruptcy who corresponds to the Official Receiver appointed under the Provincial Insolvency Act.

The case *In re Suresh Chunder Gooyee and others*[15] is also directly in point on this very question. There also, as in the present, the respondent had obtained an order for costs against the Official Assignee of the Calcutta High Court which did not contain any limitation as to the fund out of which it was payable. The Official Assignee contended that he initiated the proceedings only after obtaining the leave of the Court and that he also prosecuted it with due diligence and that therefore he could not be held personally liable for costs. In overruling that contention the learned Judge (Mr. Justice Rankin) says as follows:

> "There can be no possible question in this case as to the Official Assignee being in any sense in default Assuming that the Official Assignee is not in any possible way in default, here is a motion which has been brought by the Official Assignee for the benefit of the creditors and which has been unsuccessful. The respondent has got certain costs against which he ought to be indemnified: what is the Court to do. The suggestion is that, what the Court ought to do is to make an order that the assets of the estate, so far as they go, and they only, shall bear the respondent's costs. In my opinion that will be entirely wrong. The correct proceeding is to make an order that the Official Assignee do pay the respondent's costs. Having protected himself by obtaining leave from the Court, he has got his right of indemnity, for what it is worth, against the assets of the estate, but if in a case of this sort assets of the estate are insufficient to give a proper indemnity to the Official Assignee, then the Official Assignee before starting these proceedings, must approach the creditors or somebody and get a guarantee or an indemnity from the people or whose behalf the motion is to be brought; but it is quite impossible that a person against whom an unsuccessful motion has been brought by the Official Assignee should be left in the ordinary course in a position that he has to look to an insufficient fund and take his chance of that being sufficient."

3. (1883) I.L.R. 7 B. 484.
4. (1874) 9 Ch. App. 479.
10. (1880) L.R. 6 App. Cas. 482.
15. (1918) 23 C.W.N. 431.

Balakrishna Menon v. Kakkat Manakkal Uma.

Thiruvenkatachariar, J.

I respectfully agree with the observations of the learned Judge. The contrary view will result in serious injustice in most cases to parties whose rights are unlawfully infringed by the Official Receiver. So far as they are concerned, they are equally damnified whether the person who invaded their rights and dispossessed them of their property as in the present case was an individual acting in his own interest or an Official Receiver acting in the interest of the creditors of the insolvent's estate. It would be contrary to justice and equity if their right to be reimbursed their costs unconditionally should depend not upon whether their claim was just and well founded but upon whether a wrong-doer is a person who acts on his own behalf, or an official who *ex-officio* acts on behalf of, or in the interests of, some other individuals whose interests he has to guard, it may be for his own advantage also. The circumstance that the Official Receiver obtained the leave of the Court will only entitle him to claim reimbursement out of the estate or from the creditors in whose interest he was acting in the litigation in which he was unsuccessful. As pointed out by Mr. Justice Rankin, if the estate in his hand is not sufficiently solvent to pay the costs of the opposite party should he prove unsuccessful, he should take the ordinary precaution of getting sufficient security from the creditors before conducting the litigation on their behalf, and if he omits to do so and suffers loss, he has to thank himself for it.

As the decree against the Official Receiver in this case stands, he is clearly personally liable. Under section 35 of the Civil Procedure Code "the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid." If the intention of the Court in this case was that the costs of the respondents is to be paid only out of the assets of the insolvent's estate, the decree should have expressly said so. It would be wrong to imply such a limitation as the appellant wants us to do in the absence of any enactment or rule having the force of law which prescribes that such an implication should be made as a rule.

As regards the case *Abdul Rahiman & Co.* v. *Shaw Wallace & Co.*,[13] the decree against the Official Assignee for costs expressly provided that the same was payable "from and out of the estate of the 1st plaintiff, adjudicated insolvent, in his hands"; the application before the learned Judge was not to execute the decree as it stood but an application by the suc-

13. (1924) 21 L.W. 516.

Balakrishna Menon v. Kakkat Manakkal Uma.

Thiruvenkatachariar, J.

cessful party that the decree as drawn up was not in conformity with the judgment as to costs which contained no such limitation so as to make it executable against the Official Assignee personally. The application came on before the same learned Judge who delivered the judgment and he held that he did not intend in his judgment to make the Official Assignee personally liable and that therefore the decree as drawn up was correct. If the case is to be regarded merely as involving an interpretation by the learned Judge of his own judgment, there is little more to be said because no general principle is involved in such a question; but if the observations made by the learned Judge are to be relied upon as the appellant contends as supporting the contention that if the Official Assignee or Official Receiver acts *bona fide* in prosecuting or defending an ordinary litigation against a third party, he should not be made personally liable for costs, its correctness is open to question as it is in conflict not only with the decision of Mr. Justice Rankin on the same point in *In re Suresh Chunder Gooyee and others,*[15] but also with the decision of their Lordships of the Privy Council in the analogous case of an order for costs against a trustee in bankruptcy in *Pitt* v. *La Fontaine.*[10]

It needs scarcely be added that if the appellant was personally liable for costs decreed against him when he was Official Receiver, he is not divested of that liability by ceasing to be Official Receiver as contended for the appellant.

I concur in the order proposed by my learned brother.

We therefore decline to interfere and dismiss this appeal with costs.

N.S. *Appeal dismissed.*

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Patna.]

PRESENT:—VISCOUNT SUMNER, LORD ATKINSON, LORD SINHA, SIR JOHN WALLIS AND SIR LANCELOT SANDERSON.

P.C

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Kumar Kamakhya Narayan Singh .. *Appellant* (Plff.)*

v.

Ram Raksha Singh and others .. *Respondents (Defts.).*

Transfer of Property Act, S. 116—Lease for life of lessee—Heirs of lessee continuing in possession after his death—Tenancy between them and lessor—Agreement as to—Evidence establishing—"Agreement to the contrary" within the meaning of S. 116—Facts establishing.

---

10. (1880) L.R. 6 App. Cas 482.

15. (1918) 23 C.W.N. 431.

*P.C. Appeals Nos. 13, 82 and 102 of 1926. 22nd March, 1928.

P. C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

The proprietor of an estate leased two villages appertaining to the same under a "mukarrari istimrari" lease, dated 31st December, 1865. The lease was a lease for the life of the original lessees, both of whom died about 1891, having, in 1879, assigned their interest in the villages to one *S*. Subsequent to the said lease, the lessor gave a usufructuary mortgage to one *N*, who was in possession of the two villages from 1891-1892 to 1897-1898. *N*, the mortgagee, obtained decrees for rent against the original lessees, and *S*, the assignee, which were duly satisfied by them or their successors-in-interest. After the mortgage came to an end about 1898 no rent was paid by *S* or the defendants, his successors-in-interest, to the original lessor or to any one else. *S* continued in possession of the villages until his death in 1915, and thereafter the defendants, his heirs, continued in possession. In 1920, the plaintiff, the successor-in-interest of the original lessor, sued the defendants for possession of the villages, alleging that the nature of the tenancy was a holding over by *S* and his successors upon the terms of the original lease, except as to duration; that, by reason of S. 116 of the Transfer of Property Act, it became a tenancy from year to year; that it remained in existence till 1915, when notice to quit was given, and that the suit was therefore not barred.

The evidence showed that the position between the original lessor and the defendants' predecessor-in-title was as follows:—On the one hand, the original lessor was asserting that the grant to the original mukarraridars conveyed a life-interest only, and that after 1891, the date of the death of the original lessees, the predecessors of the defendants had no right to be in possession of the lands; on the other hand, the mukarraridars and their assignees were claiming that the lease was of a permanent heritable character, and that that was the position up to 1903, when *S* endeavoured to get his name entered as the holder of a permanent tenure, and the proprietor refused, and would only agree to give marfatdari receipts, which *S* declined to adopt, with the result that *S* remained in possession without paying any rent.

Held, that, so far from being in agreement as to a tenancy, the parties were at arm's length, and, after the termination of the lease for lives, there was no recognition by the plaintiff or his predecessor-in-title so as to constitute the defendants or their predecessors-in-title tenants, as alleged by the plaintiff, and that the evidence showed, on the other hand, that the then proprietor of the estate refused to recognise the defendants' predecessors as his tenants.

The heirs of a lessee under a lease for life, who continued in possession after the death of the original lessee, claimed a permanent right and endeavoured to establish it by getting the landlord to accept rent and give a receipt in their name The landlord received the rent, but protected himself by giving receipts in the names of the original lessees. This state of things went on for a number of years, when the heirs, or one of them on their behalf, demanded receipts in their own name, the landlord refused to give such receipts and no more rent was paid.

Held, that the parties in paying and accepting rent after the expiration of the lease for lives were acting without prejudice to their respective contentions, and that it would have to be held that there was an "agreement to the contrary" which would prevent the application of S. 116 of the Transfer of Property Act.

P.C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Consolidated Appeals Nos. 13, 82 and 102 of 1926 from three decrees of the High Court of Patna, the first two dated the 6th August, 1924 (Jwala Prasad, A.C.J., Macpherson, J.; Jwala Prasad, A.C.J. and Kulwant Sahay, J.) and the third dated the 19th March, 1925 (Das and Adami, JJ.), which reversed the decrees of the Subordinate Judge of Hazaribagh, dated respectively the 10th, 25th and 6th June, 1921 and made in Suits Nos. 58 and 87 of 1920 and No. 35 of 1919.

Lowndes, K. C. and *K. Brown* for appellant.

De Gruyther, K. C. and *Dube* for respondents.

22nd March, 1928. Their Lordships' judgment was delivered by

Sir Lancelot Sanderson.

SIR LANCELOT SANDERSON.—These are consolidated appeals by Kumar Kamakhya Narayan Singh, the plaintiff in three suits, against three decrees of the High Court of Patna, the first two dated the 6th of August, 1924, and the third dated the 19th of March, 1925, by which the decrees of the learned Subordinate Judge were reversed and the plaintiff's suits were dismissed.

The first appeal, *viz.*, No. 13 of 1926, related to Suit No. 58 of 1920, which was instituted on the 1st April, 1920.

The plaintiff, being a minor and a ward of Court, sued through his next friend: the defendants were alleged to be the heirs or assigns of Syed Mazaffar Hossein and Syed Mahamad Hossein.

The plaintiff, as the proprietor of the Ramgarh estate, claimed a declaration that the defendants had no permanent and heritable interest in the villages Jābda and Jobdi. There was a further claim for possession of the said villages and mesne profits.

The High Court came to the conclusion that the defendants had made a definite assertion of an adverse right more than twelve years prior to the suit, that they always claimed to hold as permanent mukarraridars, and that the suit was barred by Art. 144 of the Limitation Act.

The material facts are as follows:—

The two above-mentioned villages were leased by the plaintiff's predecessor, Maharaja Shri Shri Ramanath Singh, on the 31st December, 1865, to the said Syed Mazaffar Hossein and Syed Mahamad Hossein.

The kabuliat, which was produced, shows that the lease was "mukarrari istimrari" at an annual rent of Rs. 344. The mukarraridars undertook to cultivate the villages and keep the tenants contented.

P. C.
Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.
Sir Lancelot Sanderson.

It was provided that they should have no right to transfer the villages, that they should not cut fruit-bearing trees, and that they would bear the expense relating to earth work.

On the 17th September, 1875, Syed Mahamad Hossein executed an ikrarnama stating that he had no interest in the lease.

On the 1st August, 1879, the other lessee, Syed Mazaffar Hossein, assigned his interest in the villages in consideration of the sum of Rs. 1,861 to Sahai Singh, who was the predecessor-in-title of the defendants 1 to 10.

The deed recited that the said villages were held by Syed Mazaffar Hossein in perpetual mukarrari istimrari.

Both the original lessees died about 1891. Sahai Singh, the assignee, remained in possession of the villages until his death, which occurred about 1915: since that time the defendants continued in possession.

It appears that the Ramgarh Raj had given a usufructuary mortgage to one Narsingh Dyal Sahu, who was in possession of the two villages from 1891-1892 to 1897-1898. The mortgagee sued the original lessee, Syed Mazaffar Hossein, and the predecessor-in-title of the defendants for rent, and obtained decrees, which were duly paid by the defendants or their predecessor-in-title. It is an admitted fact in this case that no rent was paid to the original lessor, the Maharaja, or his successors by Sahai Singh, or the defendants. Notices to quit were served in 1915 and again on the 20th August, 1919, but the defendants remained in possession, and, accordingly, the suit was brought in 1920.

In or about the year 1903 Sahai Singh apparently was willing to pay rent to the plaintiff's predecessor-in-title, provided that his name was entered as the holder of the mukarrari interest and that he was given receipts made out in his own name.

The plaintiff's predecessor-in-title refused to do this, but expressed his willingness to receive rent and give marfatdari receipts. Sahai Singh refused to accept marfatdari receipts, and consequently no rent was paid by Sahai Singh to the original lessor.

It may be taken as a fact that rent was paid to the mortgagee, and that after the mortgage came to an end about 1898, no rent was paid by Sahai Singh or the defendants to any one.

It appears that the predecessor-in-title of the plaintiff had instituted suits for possession against the heirs and assigns of

P. C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Sir Lancelot Sanderson.

mukarraridars holding under leases similar in terms to the lease in the present case.

In 1877 the predecessor-in-title of the plaintiff was unsuccessful, but in 1903 he got a decree for possession against one Narsingh Dyal Sahu. The appeal to the High Court of Calcutta in that case is *Narsingh Dyal Sahu* v. *Ram Narain Singh.*[1]

It was decided by the High Court, relying upon a decision of the Judicial Committee of the Privy Council, that the words "mukarrari istimrari" do not in their lexicographical sense primarily imply any heritable character in the grant as the term "mourasi" does: but that they simply imply permanency from which in a secondary sense such heritable character might be inferred, it always being doubtful whether they meant permanent during the lifetime of the persons to whom they were granted or permanent as regards hereditary character, and that the words do not *per se* convey an estate of inheritance.

It was held that the tenures created by the leases in that case were grants tenable for the life of the grantee only and that they were neither heritable nor transferable.

The position, therefore, seems to have been that from and after 1877 the predecessor-in-title of the plaintiff was alleging that in the case of leases similar to that in the present appeal, the grant came to an end when the original lessees died. On the other hand, the mukarraridars were maintaining the position that such leases conveyed an estate of inheritance—until in about 1903 the predecessor-in-title of the plaintiff succeeded in obtaining a decision in his favour.

It was not alleged on behalf of the plaintiff-appellant at the hearing of this appeal that the lease of December, 1865, was more than a lease for the life of the original lessees, but the above-mentioned facts are material in considering the other contentions urged on behalf of the parties to this appeal.

It was argued on behalf of the plaintiff-appellant that when the mortgagee in possession demanded and received rent from the predecessor-in-title of the defendants, he was acting under the provisions of section 76 (*a*) of the Transfer of Property Act, 1882; that as long as the mortgage was in force the powers of the proprietor mortgagor were vested in the mortgagee; that when the term of the mortgage came to an end about the year 1898, the predecessor-in-title of the defendants became the

1. (1903) I.L.R. 30 Cal. 883.

P. C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Sir Lancelot Sanderson.

tenant of the predecessor-in-title of the plaintiff, and therefore that the defendants cannot set up adverse possession.

It was argued further on behalf of the plaintiff that the nature of the tenancy was a holding over by Sahai Singh and his successors upon the terms of the original lease, except as to duration; that by reason of section 116 of the Transfer of Property Act, 1882, it became a tenancy from year to year; that it remained in existence until notice to quit was given, and therefore that the tenancy was in existence within twelve years of the institution of the suit, and that the suit was not barred by the Limitation Act.

The main question, therefore, to be determined is whether, after the termination of the original lease in or about 1891, there was existing between the predecessor-in-title of the plaintiff and Sahai Singh or the defendants such a relation as to create a tenancy from year to year.

It is clear that there was no express recognition of the defendants or their predecessor-in-title as tenants by the plaintiff's predecessor-in-title.

In their Lordships' opinion, on the facts established in this case, the payment of the rent decrees obtained by the mortgagee against Syed Mazaffar Hossein, the original lessee, and Sahai Singh was not sufficient to create a tenancy between the mortgagor and Sahai Singh or the defendants.

The mere payment of the rent decrees obtained by the mortgagee is not inconsistent with the case of the defendants and their predecessors-in-title that they were permanent tenure holders. The payment of the rent may well have been made in order to preserve the tenure, on which they relied, from being sold.

In their Lordships' opinion, it has been established that the position between the predecessor-in-title of the plaintiff and the defendants' predecessor-in-title was that, on the one hand, the Maharaja was asserting that the grant to the original mukarraridars conveyed a life-interest only, and that after 1891 the predecessors of the defendants had no right to be in possession of the lands. On the other hand, the mukarraridars and their assignees were claiming that the lease was of a permanent heritable character, and that this was the position up to 1903, when Sahai Singh endeavoured to get his name entered as the holder of a permanent tenure, and the proprietor refused, and would only agree to give marfatdari receipts, which Sahai Singh declined

P. C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Sir Lancelot Sanderson.

to accept, with the result that Sahai Singh remained in possession without paying any rent.

So far from being in agreement as to a tenancy, the parties were at arm's length, and, in their Lordships' opinion, after the termination of the lease for lives, there was no recognition by the plaintiff or his predecessors-in-title so as to constitute the defendants or their predecessors-in-title tenants, as alleged by the plaintiff. In fact, the evidence shows that the then proprietor of the Raj refused to recognise the defendants' predecessors as his tenants.

In these circumstances their Lordships are of opinion that the plaintiff failed to prove that the relationship of landlord and tenant, on which he relied, was in existence within twelve years prior to the institution of his suit, and that, therefore, the plaintiff's suit for possession was barred by the Limitation Act, and this appeal should be dismissed.

The second appeal, No. 82 of 1926, related to Suit No. 87 of 1920, which also was instituted on the 1st April, 1920.

The plaintiff is the same as the plaintiff in the last appeal, and sued as the proprietor of the Ramgarh estate for a declaration that the defendants have no permanent and heritable interest in the three villages mentioned in the plaint, and that their right to possession ceased at the end of the Sambat year 1976, for possession of the said villages and for mesne profits.

The facts of this case are different from the facts in the last appeal, but the main issue between the parties is the same.

In 1865 the wife of the then owner of the Ramgarh estate, acting on his behalf and with his consent, granted a mukarrari istimrari lease to Tulsi Mahto and Lachman Mahto.

Lachman died in 1866 and Tulsi died in 1883.

The defendants 1 to 3 and 5 are the heirs of the original mukarraridars of the three villages. The defendants 11 to 16 and 19 to 22 are darmukarraridars.

The other defendants who contested the suit relied on a defence which succeeded at the trial, and which has not been disputed in this appeal.

The learned Judge who tried the suit made a decree for possession in favour of the plaintiff, except as to 4.09 acres being in the possession of certain defendants therein specified. The learned Judges of the High Court were of opinion that the

P. C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Sir Lancelot Sanderson.

decision of the learned Subordinate Judge in so far as he decreed the plaintiff's suit for possession against the defendants other than the defendants 6 to 9 should be set aside, and accordingly the plaintiff's suit was dismissed *in toto*.

The plaintiff alleged that the right of the lessor and his heirs to re-enter accrued on the death of the last surviving grantee, *viz.*, in 1883, but that the defendants, who were the heirs or assigns of the original grantees, remained in possession with the assent of the landlord as tenants from year to year; that at the time of the preparation of the record of rights they asserted that they were entitled to continue in possession as mukarrari istimidars. Notices to quit, therefore, were served in 1915 and again in September, 1919, but the defendants remained in possession, and this suit was instituted in 1920.

After the death of the last survivor of the original mukarraridars, the heirs remained in possession and paid rent to the predecessor-in-title of the plaintiff, but receipts were given in the marfatdari form, *i.e.*, the receipts were made out in the names of the original mukarraridars, but the names of the persons who made the payment were also entered in the documents.

This practice was continued until about the year 1898. At or about that time one of the defendants went to Padma and requested the Maharaja to accept rent and give a receipt to the person paying the rent in his own name. The Maharaja refused to accept the rent and to grant a receipt as requested. After that time no rent was paid, and it was alleged in evidence on behalf of the defendants that no demand for rent had been made on behalf of the Maharaja since the above-mentioned incident.

As in the first appeal, it was agreed by the parties to this appeal that the original lease of 1865 conveyed a life-estate only.

It was, however, contended on behalf of the plaintiff-appellant that after the death of Tulsi Mahto in 1883 the heirs of the original mukarraridars, who remained in possession, were tenants on sufferance, and that when they paid rent, which was accepted by the predecessors-in-title of the plaintiff, they became his tenants from year to year by operation of law, that this tenancy continued until it was determined by the notice to quit, and consequently that the suit was in time.

In short, it was argued that the relationship of landlord and tenant between the predecessor-in-title of the plaintiff and the heirs of the original mukarraridars came into existence in 1883; and that the mere non-payment of rent did not put an

P. C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Sri Lancelot Sanderson,

end to such relationship, which existed until the notice to quit was given in 1919.

The main defendants alleged that the heirs of the original mukarraridars and their assignees had been in adverse possession of the property in suit for more than twelve years before the suit, by right of permanent mukarrari interest therein, and the High Court accepted this contention and decided the appeal in their favour.

In answer to this argument it was urged on behalf of the plaintiff-appellant that, where a tenant admits that he holds as a tenant of the person who claims to be his landlord, but disputes the terms of the tenancy and sets up terms more favourable to himself, he does not, though he fails in establishing a more favourable tenancy, so far deny his landlord's title as to work a forfeiture, and that a man, who admits he is a tenant, cannot rely on adverse possession by asserting a larger tenancy than that admitted by his landlord: and that when the persons who are defendants in an ejectment suit are tenants, they cannot obtain the right of permanent occupancy by prescription.

The decisions in *Maharaja of Jeypore* v. *Rukmini Pattamahadevi,*[2] *Maharani Beni Pershad Koeri* v. *Dudh Nath Roy and others,*[3] *Madhavrao Waman Saundalgekar and others* v. *Raghunath Venkatesh Deshpande,*[4] and *Nainapillai Marakayar* v. *Ramanathan Chettiar*[5] and other cases were referred to.

Their Lordships do not think it necessary to refer to the above-mentioned cases in detail, for the facts of the present case do not, in their opinion, bring it within the rulings contained therein.

In this case the evidence goes to show that after the expiration of the lease for lives the plaintiff's predecessor-in-title did not, in fact, claim to be the landlord, he did not admit any tenancy on the part of the defendants or their predecessors, and he did not, in fact, allow the defendants or their predecessors to be in possession as tenants.

Their Lordships need not refer again at any length to the position which existed at the material times between the plaintiff's predecessor-in-title and the mukarraridars of the estate.

It may be summed up in the words of the learned Judge who delivered the judgment in the High Court:—

2 (1919) L.R. 46 I.A. 109. I.L.R. 42 Mad. 589: 36 M.L.J. 543 (P.C).
3 (1899) L.R. 26 I.A. 216: I.L.R. 27 Cal. 156: 4 C.W.N. 274 (P.C).
4. (1923) L.R. 50 I.A. 255. I.L.R. 47 Bom 798: 47 M.L.J. 248 (P.C).
5. (1923) L.R. 51 I.A. 83: I.L.R. 47 Mad. 337: 46 M.L.J. 546 (P.C).

"The Ramgarh estate consistently and uniformly held out that the estate granted under the istimrari mukarrari deeds was only a life-estate to enure during the lifetime of the grantees. The heirs of the grantees equally consistently insisted that the grants were permanent and heritable grants."

This was the state of things when Tulsi Mahto died in 1883.

The question then arose, what was the position of the heirs of the mukarraridars?

The heirs were claiming a permanent right and endeavouring to establish it by getting the landlord to accept rent and give a receipt in their name. The landlord was receiving the rent, but protecting himself by giving receipts in the names of the original mukarraridars.

In their Lordships' opinion the effect of this was that the rent was paid and received by the parties respectively without prejudice to their above-mentioned contentions until the question of the rights in respect of the lease was settled.

Then there came a time, *viz.*, about 1898, when the defendants, who are heirs of the mukarraridars, or one of them on their behalf, demanded receipts in their own name; the landlord refused to give such receipts, and no more rent was paid.

The question is whether it can be inferred from these facts (because there is no express agreement) that there was an implied agreement between the plaintiff's predecessor-in-title and the heirs of the original mukarraridars that they should continue in possession as tenants from year to year, for it was admitted on behalf of the plaintiff-appellant that unless he can establish that there was such a tenancy, he cannot succeed in this appeal.

In their Lordships' opinion this appeal must be decided upon the special facts of the case, which go to show, as already stated, that after the lease for lives expired the plaintiff's predecessor-in-title did not recognise the heirs of the mukarraridars as tenants. He was aware of the position taken up by the heirs of the original mukarraridars and the permanent right which they claimed and which they were desirous of establishing, and he was at pains not to do anything which might be taken to recognise that right. The parties were really at arm's length, the heirs of the original lessees were asserting their permanent interest with a liability to pay rent, a right which the Maharaja refused to recognise, but which they continued to assert consistently and which they had asserted ever since the death of Tulsi Mahto in the year 1883.

P. C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Sir Lancelot Sanderson.

It was argued that the principle contained in the provisions of section 116 of the Transfer of Property Act, 1882, should be applied, for although it could not be said that this case came expressly within the provisions of the section, it was argued that the provisions thereof should be used by way of analogy as laying down a rule of equity and good conscience. In their Lordships' opinion this is not a case of the lessee or underlessee holding over within the meaning of the section, but even if the case were to be considered on the assumption that the provisions of the section were applicable, the facts of this case would go to show, as already stated, that the parties in paying and accepting rent after the expiration of the lease for lives were acting without prejudice to their respective contentions, and it would have to be held that there was an "agreement to the contrary" which would prevent the application of the provisions of the section in the present case.

Much reliance was placed by the learned counsel who appeared for the plaintiff-appellant on the case of *Jadu Nath Belel* v. *Raj Narain Mukherjee.*[6] The learned counsel argued that the above-mentioned case was on all fours with the case now under consideration.

Their Lordships are unable to take that view. A reference to the case will show that the facts of the cited case are materially different from the facts of this case.

The learned Judges of the High Court in the cited case stated in their judgment:—

"It appears that after his purchase Jadu Nath Belel held the jote in the name of the original tenant . . and both parties must be held to have accepted the position that Jadu Nath Belel was paying rent in the name of the old tenant and that the plaintiff was his landlord."

Their Lordships are not concerned to express any opinion as to the correctness of the above-mentioned decision; it is sufficient for them to note the finding of fact, upon which the case rested.

On the facts of the case now before the Board, their Lordships have arrived at the conclusion that the predecessor-in-title of the plaintiff did not recognise the heirs of the mukarraridars as his tenants from year to year, which finding in itself differentiates the case from the above-mentioned cited case.

Their Lordships, therefore, are of opinion that the plaintiff's claim for possession was barred by the Limitation Act, and that this appeal should be dismissed.

---

6. (1912) 17 C.W.N. 459.

The third appeal, No. 102 of 1926, related to Suit No. 35 of 1919, which was instituted on the 20th February, 1919.

P. C.

Kumar Kamakhya Narayan Singh v. Ram Rakha Singh.

Sir Lancelot Sanderson.

The plaintiff is the same as in the two other suits and sued as the proprietor of the Ramgarh estate, in respect of certain villages mentioned in the plaint; he claimed (1) a declaration that the defendants have no permanent and heritable interest in the said villages and that their right to possession ceased at the end of the Sambat year 1974, (2) possession of the villages, and (3) mesne profits.

The defendants were alleged to be heirs or assigns of Bhagwan Ram Pandey and Mohan Ram Pandey.

The learned Subordinate Judge gave a decree for the plaintiff against the defendants, with the exception of defendants 20, 20 (*a*) and 21.

The learned Judges of the High Court allowed the appeal and dismissed the plaintiff's suit.

In 1866 the then proprietor of the Ramgarh estate granted a mukarrari istimrari lease to Bhagwan Ram Pandey and Mohan Ram Pandey.

Mohan Ram Pandey, the survivor of the two lessees, died in 1884.

As already stated, it is not now alleged that the lease of 1866 would be effective for more than the lives of the above-mentioned lessees. The predecessor-in-title, therefore, of the plaintiff became entitled to possession of the said villages in 1884, and this suit was not brought until 1919.

The main point in this appeal is the same as in the second, which has already been considered.

Indeed, the learned counsel who appeared on behalf of the plaintiff-appellant stated that there was no material difference between the second and the third appeals.

The learned Judges of the High Court came to the conclusion on the facts of this case that the plaintiff's predecessor-in-title was not willing to recognise the defendants as tenants, and that the suit was barred by the Limitation Act.

Their Lordships are of opinion that this conclusion is correct and that the evidence in this appeal is not sufficient to establish the case which the plaintiff admittedly has to make out in order to succeed, *viz.*, the existence of a tenancy from year to year between the predecessor of the plaintiff as landlord, on the one hand, and the heirs of the mukarraridars as tenants on the other hand.

P. C.

Kumar Kamakhya Narayan Singh v. Ram Raksha Singh.

Sir Lancelot Sanderson.

They are therefore of opinion that this appeal also should be dismissed.

In their Lordships' opinion, all three appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *Solicitor, India Office.*

Solicitors for respondents: *Watkins & Hunter.*

K.J.R. *Appeals dismissed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE ODGERS AND MR. JUSTICE JACKSON.

Sri Raja Ravu Sri Krishnayya Rao and another .. *Appellants**

v.

Rajah of Pittapur .. *Respondent (Plff.).*

F. B.

Krishnayya Rao. v. Rajah of Pittapur.

Hindu Law—Widow—Adoption with consent of sapindas—Agreement to adopt a major son of one of two sapindas—Consent of that sapinda—Arrangement to settle half the husband's estate upon the widow to discharge her personal debts and to pay her maintenance to be charged on the other estate—Subsequent application by the widow to the other sapinda for his consent—Refusal on the ground of corrupt motive and selfish gain on the part of the widow—Adoption by widow—Execution of settlement and maintenance deeds—Validity of adoption—Power of Court to scan widow's motive in making adoption—Sapinda when justified in refusing consent to adoption by widow—Evidence Act, S. 33—Legal representative—Natural son adopted into another family on the date when the evidence is sought to be admitted.

A Hindu widow who had no authority to adopt from her husband and who had only two persons as sapindas desired to adopt a son and applied to one of them to give his major son in adoption. After he gave his consent, questions arose as to the payment of the widow's personal debts amounting to 2½ lakhs of rupees and her maintenance and it was agreed between the widow on the one hand and the sapinda and his major son who was the boy to be adopted on the other hand that one-half of her husband's estate should be settled upon her absolutely so as to enable her to pay her debts and that she should be given a maintenance of Rs. 500 a month, the same being charged on the other half of the estate which would be the property of the adopted boy. About a few days after she applied to this sapinda, she applied to the other sapinda for his consent to the adoption but he refused his consent on the ground that he came to know that she was not adopting with an honest purpose either for the spiritual salvation of her deceased husband or for the perpetuation of his line but with a corrupt motive, bearing spite against him for his not rendering pecuniary help to her brothers as requested by them and her, and with a view to put him to loss by depriving him of his reversionary interest and

---

*L.P.A. No. 52 of 1927. 7th March, 1928

F. B

Krishnayya Rao. v. Rajah of Pittapur.

for the selfish gain of herself. The widow, however, adopted the boy and, on the day after the adoption, a settlement deed and a maintenance deed were executed by the adopted boy in favour of the widow, carrying out the terms of the arrangement agreed upon. The sapinda who refused his consent brought a suit for a declaration that the adoption is invalid and not binding on him and that it does not affect his rights as reversioner under the Hindu Law.

Held, by the Court (Kumaraswami Sastri, J, dissenting) that the agreement to execute the settlement and the maintenance deeds was the condition precedent to the making of the adoption and the motive of the widow in making the adoption was corrupt, that the plaintiff was justified in refusing his consent, that, on account of his proper refusal, there was no consent of the majority of the sapindas which was in law necessary to validate the adoption, and that, consequently, the adoption was invalid.

Held, also that, in the case of an adoption with the consent of sapindas, the Court can scan whether the widow, in making the adoption, is actuated by proper or improper and corrupt motives and whether the sapinda's refusal to give his consent is proper or based upon purely personal grounds.

Held, by Kumaraswami Sastri, J., that the agreement to adopt was prior to, and independent of, the agreement to execute the settlement and the maintenance deeds and the widow's motive was not corrupt, that, though the debts were personal to her and would not bind the reversioner, the stipulation that they should be discharged out of the estate to be allotted to her was not illegal as it would be open to a Hindu widow, who can in law stipulate with the natural father of the boy to be adopted for her enjoyment for life of her husband's estate, to stipulate for the conversion of such life-estate into an absolute estate of a portion, that the plaintiff's refusal of consent was based on considerations of personal benefit and was, therefore, improper and that, consequently, the adoption was valid.

Where an adoption is made by a Hindu widow both in fulfilment of her religious duties and also for getting a gain for himself, the adoption is valid but the arrangement for her personal benefit, if not within the limits allowed by law, is void.

A reversioner cannot withhold his consent from corrupt or improper motives. What he has to see is the interest of the family to which the adoption is made.

Where there are only two sapindas who have to be consulted and one of them refuses his consent for motives which the Court holds to be improper, the Court will ignore such refusal and hold that the adoption is valid if the consent of the other sapinda has been obtained for the adoption.

The fact that one of two sapindas was a sapinda by reason of adoption into the family and not by natural birth is no ground for holding that there is any difference between him and the other natural born sapinda as regards their capacity to consent to an adoption by the widow.

Obiter. A Court cannot scan a widow's motive in making an adoption.

Held by the Court.—In seeing whether a person is the legal representative of another or not for the purpose of rendering evidence admissible under S. 33 of the Evidence Act, regard must be had to the state of affairs when the evidence is sought to be admitted. The fact that a person would have been the legal representative as being the natural son if there was no adoption would not make him legal representative after he has been given away in adoption, for the purpose of the admissibility of evidence.

F. B.

Krishnayya Rao. v. Rajah of Pittapur.

Appeal under clause 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Krishnan, dated the 28th day of October 1926 and passed in Appeal No. 62 of 1921 preferred to the High Court against the decree of the District Court of Godavari at Rajahmundry, dated 5th October 1920 in O.S. No. 34 of 1919.

T. R. Ramachandra Iyer, N. A. Krishna Iyer and *C. Rama Row* for Appellant.

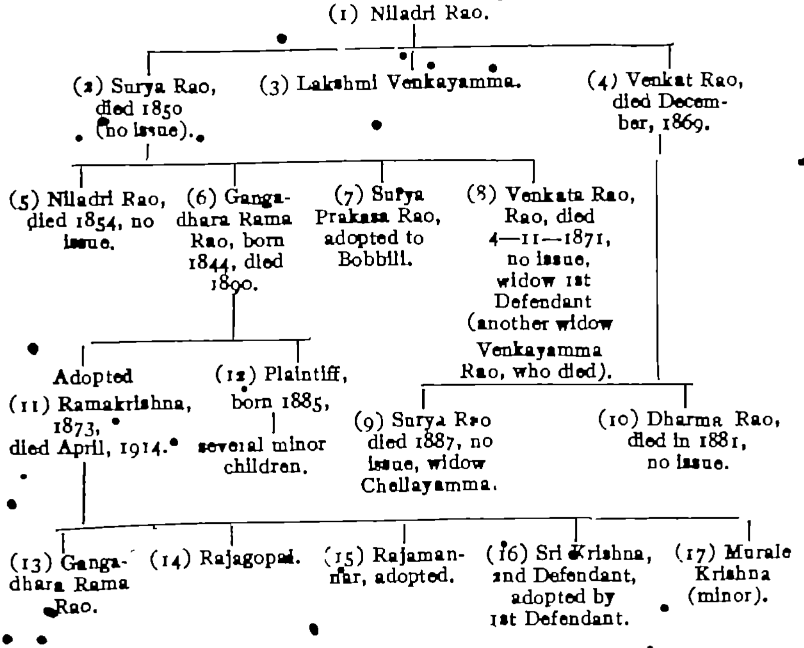
S. Sreenivasa Aiyangar, A. Krishnasami Iyer and *S. Venkatesa Aiyangar* for Respondent.

The appeal was heard in the first instance by Krishnan and Venkatasubba Rao, JJ., who delivered the following

Krishnan, J.

JUDGMENTS. *Krishnan, J.*—This is an appeal from the decree of the District Judge of Godavari in O.S. No. 34 of 1919 on his file which was a suit brought by the respondent the Maharaja of Pittapuram to have it declared that the adoption of the 2nd defendant by the 1st defendant, the widow of Venkata Rao, her deceased husband, is invalid and not binding on the plaintiff and not affecting his rights in any way. The suit was decreed in plaintiff's favour by the District Judge and hence the appeal to us by the 2nd defendant. The 1st defendant it may be mentioned died pending the appeal and in her place Surya Prakasa Rao has been brought on the record provisionally as the 3rd respondent.

The genealogical table given below shows the relationship of the parties concerned in this litigation and will serve to elucidate some of the questions raised.



Krishnayya Rao v. Rajah of Pittapur.

Krishnan, J.

Gangadhara Rama Rao (No. 6 in the pedigree), the old Raja as he is hereafter called in this judgment, when he was the Zamindar carved out the estate of Gollaprolu which is the subject-matter of this litigation from his Pittapur Estate and granted it to his brother Venkata Rao (No. 8 in the pedigree) in lieu of maintenance by deed Ex. O, dated the 8th December 1869 (Ex. O-1 being its counter part). There was some dispute as to the nature of this grant but it was admitted before us by the plaintiff's vakil that it was an absolute grant. Venkata Rao died in 1871 leaving as his widow the 1st defendant Ramayamma but no issue. The adoption in dispute in the present suit was made by Ramayamma to her deceased husband Venkata Rao on the 15th February 1914 in Madras, the person adopted being Sri Krishna (No. 16 in the pedigree), the fourth son of Ramakrishna (No. 11 in the pedigree) who had himself been adopted by the old Raja in 1873. Sri Krishna was a major at the time of his adoption, a very unusual circumstance as ordinarily minors are adopted and there was his minor brother Murale Krishna available. It is this adoption that plaintiff is seeking to invalidate as one of the nearest reversioners of Venkata Rao being according to him the aurasa son of the old Raja. Defendants while supporting the validity of the adoption denied that plaintiff was a reversioner of Venkata Rao as according to them he was not the son of the old Raja by his wife Mangayamma as alleged but a stranger boy, a suppositious child fraudulently put forward as his son by her and they pleaded that he was therefore not entitled to dispute the 2nd defendant's adoption.

Two main issues arose for decision on the pleadings besides some subsidiary ones. The first question related to the alleged aurasa sonship of the plaintiff; it was split up into two parts as the burden of proving that he was the son of his alleged mother Mangayamma was on the plaintiff whereas when that is established the defendants had to prove under S. 112 of the Evidence Act that the old Raja had no access to Mangayamma at any time that the plaintiff could have been begotten.

The issues were thus framed as

1 (*a*) whether the plaintiff is the son born of Raja Mangayamma Garu, and

1 (*b*) if so, is he not the aurasa son of the Raja Gangadhara Rama Rao.

The other issue was issue 3.

"Whether the adoption of 2nd defendant by the 1st defendant is true and valid."

These are the issues we have to consider in this appeal.

Before, however, dealing with the evidence regarding issues 1 (*a*) and 1 (*b*) a preliminary question arises for decision regarding the admissibility in evidence of certain documents which were tendered by the defendants in the Lower Court but were rejected by

Krishnayya Rao
v.
Rajah of Pittapur.
—
Krishnan, J.

that Court and which are again tendered in this Court in C.M.P. No. 554 of 1921. A list of them is given on page 956 of the paper book, Vol. I, parts I and II and they have been printed in a separate book. They consist mainly of public copies of 64 depositions of witnesses taken in O.S. No. 6 of 1891 with other documents asked to be admitted along with these depositions as they are referred to in them or are required to explain them. The case of these other documents need not be considered apart from that of the depositions.

The admissibility of these depositions in evidence in the present case is governed by S. 33 of the Evidence Act which deals with the admission of evidence given by witnesses in a former judicial proceeding as evidence in a subsequent judicial proceeding. There are three provisos to the section which must be complied with before such evidence can be admitted; we are here concerned really only with the first proviso which requires "that the proceeding was between the same parties or their representatives in interest." The District Judge has held that this condition is not fulfilled in the present case and I agree with him.

The evidence sought to be admitted was given in what is called the 1st Pittapur case, O.S. No 6 of 1891. That was a suit brought by Ramakrishna against the present plaintiff and the Court of Wards as his guardian to recover possession of the zamindari of Pittapur which had been taken possession of by the Court of Wards on behalf of the present plaintiff. There was no doubt an issue in that case as to whether the present plaintiff was the aurasa son of the old Raja and a large body of oral evidence was adduced on both sides. Though the 1st Court had given a finding against the present plaintiff on the point the High Court in appeal and the Privy Council on further appeal did not go into the question. It is true the same issue has arisen in the present case but Ramakrishna is not a party here though plaintiff is. It is only if any of the defendants here can be held to be "the representative in interest" of Ramakrishna in the previous suit that section 33 proviso will apply. It is not contended that the 1st defendant, the widow, is in any sense such a representative. But it is strenuously argued for the appellant that the 2nd defendant is such a representative. It seems impossible to hold that 2nd defendant is sued here as the adopted son of Venkata Rao with reference to Gollaprolu estate and as such it is difficult to see how he could be treated as the representative of Ramakrishna who was suing to recover Pittapur Estate in his own right as the next heir of the old Raja on his death. If any one could be treated as his representative in interest it will only be his eldest son who might succeed him in the zamindari on his demise. Even as one of the junior sons of Ramakrishna, the 2nd defendant cannot be treated as his representative; he is sued in the present suit only as the adopted son of Venkata Rao.

Krishnayya Rao v. Rajah of Pittapur.

Krishnan, J.

A lengthy argument was addressed to us as to the meaning of the words "their representative in interest" in the section. It was said that the words meant a person who had the same interest in the question at issue as the person or persons in the second judicial proceeding irrespective of what the subject-matter of the second proceeding was and it was argued that as Ramakrishna and his sons and other members of the Pittapur family were equally interested in preventing a stranger from entering into the family circle as a member of it and as such entry was a common danger to all the members to be warded off, Ramakrishna is a representative in interest of the 2nd defendant whether one looks upon him in his capacity as Ramakrishna's son or in his capacity as the adopted son of Venkata Rao, for the latter was also a member of the Pittapur family. Though Venkata Rao was divided from the old Raja as the result of Ex. O and O-1 still it is said he is not divided from him as to the impartible zamindari of Pittapur. These are ingenious contentions which are difficult to follow and are based on the contention that when the proviso talks of "*their* representatives" we must read the word "*their*" as referring to the parties in the second proceeding. The use of the word "was" in the past tense in the proviso it is argued shows that "the proceeding" referred to in it must be the earlier or the first proceeding and the proviso when expanded would then read as follows: "that the first judicial proceeding was between the same parties as in the second judicial proceeding or between the representatives in interest of the parties in the second judicial proceeding." The wording of this proviso is perhaps a little defective as pointed out by Ameer Ali and Woodroffe in their book "The Law of Evidence applicable to British India," 8th Ed., p. 353; instead of the words "their representative in interest" the words should have been "those whom they represent in interest"; or the word "is" should have been used instead of "was" so that the proceeding may be read as the second proceeding. The meaning however seems to me quite clear and has never been doubted; the parties in the second proceeding in which evidence is tendered must be the representative in interest of the parties in the first proceeding; or, in other words, should be persons who derive their title through or claim under them or shortly are their privies. The English rule is stated very clearly in "Taylor on Evidence," 11th Ed., para. 467 as follows: "Evidence taken on the first trial is admissible in a second trial if, although the same trial is not between the same parties the second trial is between persons who legally represent the former parties or are their privies in estate." "Halsbury's Laws of England" states the rule in para. 751, Vol. 13, page 546 thus: "At common law depositions taken in a judicial proceeding are admissible in evidence in a subsequent judicial proceeding in proof of the facts stated therein provided the proceedings are between the same parties or their privies." The

Krishnayya Rao v. Rajah of Pittapur.

Krishnan, J.

observations of Lord Cottenham in *Humphreys* v. *Pensam*, 40 E.R. p. 498, that "depositions can only be read for or against those who are parties or privies to the suit in which the deposition was taken; and they cannot be read for a party unless they can also be read against him" are cited.

There is no reason to suppose that the Indian rule is in any way different from the English rule on this point. The words "representative in interest" occur also in S. 21 of the Evidence Act and there they cannot possibly have the meaning suggested by the appellant's vakil. There is no reason to construe the same expression differently in different sections of the same Act.

Appellant's vakil has cited certain cases on *res judicata* where a finding in a suit brought against a widow representing the estate of her husband has been held to be *res judicata* against the reversioners in *Risal Singh* v. *Balwant Singh*, I.L.R., 40 All., 593 (P.C.) and *Vaithialinga Mudaliar* v. *Srirangath Anni*, I.L.R. 48 Mad. 883 (P.C.). Those decisions are based on the fact that the widow represents the estate for herself and the reversioners and on a principle analogous to that embodied in Explanation 6 to S. 11, Civil Procedure Code, the latter should be held to claim under her. The case of the Vatandar in *Radhabai and Ramchandra Konher* v. *Anantrav Bhagvant Deshpande*, I.L.R. 9 Bom. 198, proceeds on a similar principle. They recognize no doubt a certain extension of the rule of *res judicata* and such extension has also been recognized with reference to S. 33 of the Evidence Act in the case of *Patinhakkara Vallabhan Chattan Raja* v. *Rama Varma* in 28 M.L.J. 669 in the case of holders of Malabar stanoms. But the position in the case before us is not in any way analogous to those cases. Here Ramakrishna was not litigating on behalf of anybody but himself. The English cases in which such extensions have been recognized are representative actions as in *Llanover* v. *Homfray* and *Phillips* v. *Llanover*, 19 Ch. D. 224.

The argument that S. 33 can be applied without any reference to the subject-matter of the two suits seems clearly wrong. The case of *Doe* v. *Earl of Derby*, 1 Ad. & El. 783, shows that the same title must have come into question in each case. The words 'representative in interest' clearly show that we have to consider the interest involved in each case and they must be the same, or similar. Without reference to the subject-matter it cannot be predicated that one is the representative in interest of another. Here we have two different and distinct estates involved in the two suits, the Pittapur and Gollaprolu Estates. On this ground also the evidence tendered must be rejected.

For the above reasons I agree with the District Judge that the depositions tendered are inadmissible in evidence in this case. We have now to consider issues 1 (*a*) and 1 (*b*) on the evidence on record.

Krishnayya Rao v. Rajah of Pittapur. —— Krishnan, J.

I shall now proceed to consider issue 1 (*a*) first which raises the question whether Mangayamma is the mother of the plaintiff as alleged by him or not. The circumstances leading up to the alleged birth of the plaintiff may be briefly stated. Mangayamma was married in 1861 when she was 16 years' old, and had attained her puberty, to the old Raja who was then a lad of 17. They lived together in Pittapur but she showed no signs of pregnancy. The Raja married a second wife Sitayamma in 1865 and again a third wife Subbayamma generally known as Nuzvid Rani in 1871. In 1879 he again married his fourth wife Ramayamma, who however died soon after in 1882. Not having any children by any of his wives he seems to have conceived the idea of taking a boy as his son in adoption as he was anxious to defeat the claims of Surya Rao (No. 9 in the pedigree) who would succeed to his estate if he died issueless, and whom he particularly disliked. His choice fell upon Ramakrishna (No. 11 in the pedigree), the brother of the late Raja of Venkatagiri and of the present Maharaja of Bobbili. He adopted Ramakrishna in September 1873. In 1881 Mangayamma developed what seemed to be symptoms of pregnancy and her *Sreemantham* ceremony was performed on a grand scale at Samalkota in April, 1881. It is not disputed that it was generally believed that she was really pregnant (*see* para. 14 of the District Judge's judgment). The old Raja was undoubtedly of that opinion as appears from his letters to his legal adviser and friend Mr. Willie Grant of Madras and to his agent Venkatarangam Chetti in Madras. *See* Exhibits LX (*s*), XXXVIII (*a*), LX (*c*), LX (*d*), LX (*aa*), XXXVIII (*d*), LX (*j*), LX (*e*), LX (*f*), LX (*g*), LX (*h*), LX (*k*) and LX (*l*).

Sreemantham, it may be mentioned, is the ceremony performed among Hindus at the first pregnancy of a woman, generally between the fourth and the eighth months of pregnancy. Mangayamma went away soon after to her parents' house in Tiruvur for confinement and remained there in all for over three years. It would appear from the evidence that she had what seemed like labour pains after the ordinary period of gestation of nine months but she brought forth no child at all. All the appearances of pregnancy still continued. The evidence is that they continued for 4 nine months' periods, that is for three years in all, when they mysteriously disappeared and she regained her normal appearance; and the witnesses say her menses were re-established. The witnesses who speak on the point are P.Ws. 97, 98, 99, 100 and to some extent 101. There does not seem to be any special reason to discredit their evidence or to think Mangayamma was merely feigning. The symptoms would seem to suggest that the lady had what is known to medical science as "Spurious pregnancy" or *Pseudocyesis*. Several medical works were cited to us as to this peculiar condition of women; among them were Gallabin and Blacker's

Krishnayya Rao v. Rajah of Pittapur. — Krishnan, J.

Practice of Midwifery, p. 191, Playfair's Science and Practice of Midwifery, Vol. I, p. 182 and the recent publication of Fairbairn called "Gynaecology with Obstetrics," p. 103. The following passage may be quoted from Fairbairn to understand what spurious pregnancy is like and how it is caused. "Pseudocyesis is the term used for cases in which signs and symptoms simulating pregnancy are present, sometimes deceiving patient and medical adviser. The condition occurs most frequently in women with an intense desire for a child, those married late in life or near the climacteric or those to whom a successor is important for financial or family reasons. There may be some mental instability or actual delusion, of the error of which it is impossible to convince the patient. In other cases the pregnancy may be feigned, to obtain damages, force marriage, or extract blackmail, or in the case of a married woman as a preliminary to producing a supposititious child. In such cases there may be amenorrhoea, indefinite changes and the woman may state that she has morning sickness, and has felt movements which has led to the loosening of her garments. There may be a definite swelling of the abdomen simulating pregnancy, followed by a spurious labour."

It is the defendants' case on the other hand that she had no appearance of pregnancy at all in Tiruvur but was only pretending that she had, watching all the time for an opportunity to get hold of a male child and pass it off as her own son. The Venkatagiri people on behalf of Ramakrishna seem to have gone to the length of setting up spies in Tiruvur to watch the movements of Mangayamma to see whether she was making any attempt to smuggle a child and to prevent it. I am inclined to think there was no real ground for the suspicion. It is true they have called a witness D.W. 15 who speaks of such an attempt but as he is discredited by the District Judge (para. 20 of judgment) and is entirely uncorroborated, I can place no reliance on him. In any case there was no child either born of Mangayamma or smuggled by her in Tiruvur.

While Mangayamma was in Tiruvur the old Raja married three more wives in succession in the course of three months from April to June 1884, namely, the Viravaram Rani, the Chitrada Rani and the Bobbili Rani. This seems to have wakened up Mangayamma lest she lose the favour of her husband and she came away from Tiruvur in August 1884 to Rajahmundry where she stayed till November, whence she went over to the Raja's residence in Pittapur itself.

While she was thus living in Pittapur it is the plaintiff's case that she became again pregnant by the Raja about the end of January or beginning of February and that he was born as the result of that pregnancy as the son of Mangayamma and the Raja on the night of the 5th October 1885,

Krishnayya Rao v. Rajah of Pittapur. —— Krishnan, J.

It is the case of both sides that on the night of the 5th of October a child was in Mangayamma's room in the Fort and that child is the plaintiff. The real question for decision is whether that child was a child given birth to at the time by Mangayamma or was a child of a stranger woman smuggled into her apartments from outside by her *dasis* Jalde Appi and P. Seetha with the help of her confidential servant Kanakayya as alleged for the defendants. Considering this event took place over 40 years ago the plaintiff being now 41 years old a good portion of the evidence has been lost by the death of witnesses; and one has to bear in mind also that the witnesses are now speaking to events which happened long ago. The contention of the appellant's learned vakil before us mainly is that the circumstances of this case indicate the extreme improbability of Mangayamma having become pregnant and having given birth to a child on the night in question and he therefore asks us to accept as true the evidence given by the two *dasis* Appi and Seetha as to the introduction of the child and to hold that the plaintiff is not the son of Mangayamma. The circumstances he refers to are—

(1) The fact that the pregnancy in question here is the first pregnancy of a woman who was 40 years old and who had been married and living with her husband for about 24 years and yet was sterile till then.

(2) Spurious pregnancy occurs in sterile women generally at their climacteric or the period of their menopause and thereafter conception is impossible or extremely rare.

(3) The old Raja was suffering from obesity, diabetes, gonorrhea of 15 years' standing and other diseases and was probably impotent and he is not likely to have impregnated Mangayamma in February 1885, as alleged; she had no symptoms of pregnancy in Pittapur.

(4) The evidence of what took place in Mangayamma's room indicates that there were really no labour pains and no child birth. These are the contentions raised and they may each be considered separately.

As regards No. 1 it is no doubt true that the likelihood of first pregnancy in a woman of 40 is very small. Nevertheless it cannot be said that she will not conceive; such conceptions though rare are known. Appellant's vakil himself does not deny it. He places more stress upon his second objection based on Mangayamma's spurious pregnancy. The medical books cited no doubt do countenance the idea that in sterile women pseudocyesis appears generally towards the time of menopause but here again it is not a necessary inference from pseudocyesis that menopause has occurred and that no further pregnancy will take place. Dr. Hingston, the medical expert examined as P.W. 103 says that spurious pregnancy rather helps towards subsequent real pregnancy than hinders

Krishnayya Rao v. Rajah of Pittapur.

Krishnan, J.

it. In the case of Mangayamma there is positive evidence that she had menses after the symptoms of spurious pregnancy subsided in Tiruvur (P.Ws. 97 to 100) and again she had them for some months after the plaintiff's birth; the District Judge has referred to this evidence in para. 45 of his judgment; and corroborated as it is by entries in the accounts there is no reason to distrust it. Menopause occurs in India according to Dr. Hingston about the 45th year; in England the chances of conception and of childbirth are not taken to have come to an end till a woman is 52 or 53 years old. There is thus nothing in these two abovementioned circumstances to militate necessarily against the truth of Mangayamma's delivery. The utmost that could be said is that it would be an occurrence of an unusual character. The third objection taken rather depends upon issue 1 (*b*) dealing with the old Raja's powers of potency. This issue itself was not very seriously pressed before us as the learned vakil for the appellants rightly appreciated that the evidence now on record was too meagre to establish impotency more especially in view of the fact that Viravaram Rani, one of the wives of the old Raja, was admittedly actually pregnant between February and October 1885 and gave birth to a daughter soon after plaintiff was born. It was feebly suggested that this child was the result of an act of unchastity on the part of the Rani committed while she was in her parents' house where she had gone about the time. It is easy to make such an imputation but there is no proof of it at all. It must be rejected. If the Raja could have a child by Viravaram Rani in spite of his ailments, he could have another at the same time by Mangayamma unless she was incapable of conception. Objection No. 3 is also thus not of any force.

The 4th objection depends on the evidence as to Mangayamma's appearance before plaintiff's birth and as to what took place on the night of the 5th October 1885 when plaintiff was said to have been born. Defence case is that there were no symptoms of pregnancy in Mangayamma before the birth of plaintiff, but as pointed out by the District Judge in paras. 21 and 22 of his judgment there is a considerable body of evidence on the plaintiff's side of old and respectable ladies who speak to her having all the appearance of a pregnant woman before the plaintiff's birth and of losing that appearance thereafter. The evidence of some of these witnesses are, it is true, open to attack; they are distant relations of the plaintiff's or interested witnesses, but even leaving them out there is sufficient evidence to think that Mangayamma did have the appearance that these witnesses speak to. The District Judge has carefully analysed this evidence at length and it is unnecessary for me to go into it in detail again. In fact this evidence is one of the strong points on which the plaintiff's vakil relies. It should be noted that it is not the defendants' case that Mangayamma had an attack of spurious pregnancy while in Pittapur, in which case the

Sri Krishnayya Rao v. Rajah of Pittapur. — Krishnan, J.

appearances might be consistent with their case. The next point urged was that the evidence as to the commencement of labour pains on the 5th on plaintiff's side is very discrepant, some witnesses putting them as having begun in the morning, others at different hours of the day and some even so late as in the evening. It is said that there were really no labour pains at all, as the evidence is that the old Raja and the doctor Dharmaraju, P.W. 48 were all asleep at the time that Mangayamma was being confined; this, it is said, is a very unnatural condition of affairs, as Mangayamma as a primiparae would have suffered great pain and would have screamed out and created sufficient noise to wake up all sleepers if she was really being confined. It is also pointed out that there is a discrepancy in the plaintiff's evidence regarding the cutting of navel cord of the child. These criticisms do not seem to me to carry much force. The important thing is the evidence as to Mangayamma getting labour pains that day, for that would indicate her subsequent confinement, and there is a good deal of evidence on the point which the District Judge has referred to at length in para. 26.

The absence of a midwife in the room was also commented upon. Ordinarily one would have expected a midwife to be present but the Ranis seem to be content with having their maids to attend on them and act as midwives. The same procedure was adopted in the case of Viravaram Rani's confinement some 15 days after. The absence of a midwife does not therefore lead to any suspicion. There was Dr. Dharmaraju, P.W. 48, ready to help if anything went wrong. His evidence which the District Judge has accepted and which there is nothing definite to justify one in rejecting speaks to his having remained outside the Rani's room to be ready to help. The old Raja has no doubt given a very handsome pension to him which is continued by the plaintiff and a house worth Rs. 2,000; but it does not follow that this favour was shown to him to make him give false evidence in support of the fact of the child being the Raja's child. It was also urged by the appellant's vakil that plaintiff has adduced no evidence as to his actual birth from the womb of Mangayamma. Bodithi, a dasi, and Chitrada Rani who were both present besides others are now dead and gone and as 40 years have now elapsed since the event no great weight can be attached to this criticism. What is proved clearly indicates that Mangayamma gave birth to the child.

The evidence of Dr. Dharmaraju is very material in the matter as he and the Raja went into Mangayamma's room immediately after the plaintiff's birth was announced and he felt the pulse of the lady and saw the afterbirth on the ground. His evidence is very clearly in favour of the plaintiff's case. I have already stated that there is no good reason for discrediting him. Defendant's objections except that they throw some suspicions on the plaintiff's story are not in my opinion sufficient to justify us in discrediting it alto-

Sri Krishnayya Rao v. Rajah of Pittapur.

Krishnan, J.

gether. The question then is, can we believe the evidence of the two dasis Appi and Seetha who speak directly to the introduction of the spurious child. They give a rather fantastic story that on the 5th October late in the day they were suddenly called by Mangayamma who confided to them her intention to smuggle a child and asked them to help in the matter by going at night to the wall of Lakshiminarayana Doddi on the outskirts of the fort and bringing away the child they were told that one Kanakayya would bring there and they agreed. The story on the face of it does not look a very probable one. If Mangayamma was really smuggling a child she would have taken greater precautions than confide to these dasis who are not shown to be her confidential dasis. The dasis don't seem to have taken any particular precautions themselves; but only went to Kanakayya and brought the child he had ready there. The risk of discovery was great and yet nothing seems to have been done by way of precaution. Bodithi, another dasi, is said to have gone and brought the afterbirth through another route where she had to pass through certain parahs or guards. Seetha has not been examined as a witness now, as she is dead, but the evidence given by her in the previous suit has been filed and read. It was admitted under S. 32, cl. (3) of the Evidence Act on the ground that her evidence made her liable to prosecution as an abettor of the crime of introducing a spurious child. The respondent's vakil has objected to this evidence and it is doubtful whether it is admissible. Assuming, however it is, there is only her evidence and Appi's to support the defendant's story of the child being smuggled. The District Judge who heard the evidence of Appi has discredited her as being a worthless witness and it is not possible for us in appeal to rely on such a witness. Seetha gives the same story. They are both witnesses of no particular credit and are on their own showing accomplices and I must decline to act on their evidence especially as it is in contradiction of the evidence on the plaintiff's side which seems to be far more reliable. It is clear that at any rate it is entirely inadequate to justify us in interfering in appeal with the District Judge and holding that the plaintiff the Maharaja is not the son of his parents.

As pointed out by respondent's vakil, the very moment the old Raja was appraised of the plaintiff's birth he accepted him as his aurasa son and proclaimed him to the world to be such. On the very night guns were fired from Pittapur Fort. The Brahmins were given presents. Relations and friends and important officials were informed of the event. There is a good deal of evidence to show that the Raja's relations all accepted plaintiff as the Raja's son and attended his Bharasala and Annaprasanam ceremonies and treated him as the real son of the Raja. The learned District Judge has set out all this evidence at full length and it is therefore unnecessary to discuss it again.

It is clear that the plaintiff's parents fully recognized him as their son and he was treated by all others as his son. Rama Krishna who stood to lose so much by the birth of the son took no immediate steps to challenge it except to write a letter some six months after, asking the old Raja for particulars of the birth of his son to which the Raja replied indignantly that he had already informed him of the event by telegram at the time; it was only after the old Raja's death in 1890 that Rama Krishna ventured to challenge it in a Court of Law.

Now it has been laid down by the House of Lords in the famous *Douglas Peerage case* reported in "Notable British trials; Scotch series, the Douglas cause" on page 152 that "where a child establishes the possession of filiation which is the acknowledgment of the parents, and habit and repute everything must be presumed in his favour and he cannot be dispossessed of that estate except upon clear, strong and decisive evidence." Though in the present case the burden was initially on the plaintiff to show that he was the son of Mangayamma it was shifted on to the defendants as soon as he showed that he had been acknowledged by his parents to be their son and that he has been accepted as such by repute and habit for the last 40 years; it would require much clearer and stronger and more reliable evidence on the defendant's part to justify a finding against the plaintiff's paternity.

The motherhood of Mangayamma being found, it is conceded that there is no case to disprove the fatherhood of the old Raja.

In these circumstances, I accept the District Judge's findings on issues 1 (*a*) and 1 (*b*) and find that plaintiff is the aurasa son of the late Raja of Pittapur, Gangadhara Rama Rao.

The next issue for consideration is the 3rd issue as to the truth and validity of the adoption of the 2nd defendant by the 1st defendant. The truth of the adoption is not now disputed. The adoption ceremony was carried out on the morning of the 15th February 1914, in Moti Mahal in Madras in the presence of a number of very respectable witnesses who have all attested the registered deed of adoption, Exh. XVI. The evidence is conclusive on the point. The suggestion made on the plaintiff's side in the Lower Court that Rama Krishna was not in a state of health or mind to take part in the adoption ceremony or to give away the boy in adoption is not now persisted in. The homam was subsequently perfomed in the bungalow of the Maharaja of Bobbili. The question that remains is thus only as to the validity of the adoption.

The plaintiff's objections to the validity of the adoption are formulated by the District Judge in paragraph 121 of his judgment. They may be stated as follows:—

(1) The 1st defendant made no *bona fide* attempt to obtain plaintiff's consent; she had made up her mind to adopt the 2nd

Sri Krishnayya Rao v. Rajah of Pittapur. —— Krishnan, J.

defendant whether plaintiff consented or not and her letter Exh. EE-9, asking for consent was sent as a mere formality.

(2) Plaintiff's refusal was proper and justified on account of the unfitness of the boy and of the nature of the arrangements under which the adoption was made.

(3) Rama Krishna's consent by itself was ineffective and legally insufficient to support the adoption. Plaintiff being the aurasa son of the late Raja and therefore of superior status to him and the head of the family, his objection should prevail.

(4) The adoption being made 40 years after 1st defendant's husband's death under the influence of her brothers and nephews and from corrupt and improper motives to defeat the plaintiff's reversionary right and to secure half the estate and other benefits for herself and for her brothers it is invalid.

(5) She had no power of adoption as her husband had entered into an agreement not to adopt and that implied a prohibition by him to her not to adopt.

These are the objections which have been urged before us as well and they are the ones we have to deal with.

The District Judge has upheld the first objection and thinks that the 1st defendant did not make a *bona fide* attempt to get plaintiff's consent and did not care to be influenced by his advice and that that ground alone was sufficient to hold the adoption to be invalid. He deals with the point in para. 130 of his judgment. I am of opinion that on the evidence this view cannot be supported. We find that after obtaining Rama Krishna's consent letter, Exh. XV (*a*), dated 30th January 1914, she wrote to plaintiff her letter Exh. EE-9, on the 2nd of February for his consent. As she was proposing to adopt Rama Krishna's son she had naturally to make sure of his consent first. There is nothing wrong in the wording of letter Ex. EE-9; in fact the plaintiff admitted in the witness box that it was a proper letter. It is now discovered that it does not expressly mention that plaintiff is a sapinda. That is of no importance; it is as a sapinda that plaintiff is asked his consent and in no other capacity. The District Judge says that she had made up her mind to adopt before sending Ex. EE-9 whether plaintiff consented or not. No doubt she had provisionally arranged to take 2nd defendant in adoption but there is nothing to justify the conclusion that she had finally made up her mind on the point or that she would not have listened to plaintiff's advice if there were good reasons for it. Her conduct in sending him a reminder, Ex. EE-10, on 7th Feb. 1914 giving her altered address when she did not get plaintiff's reply promptly clearly shows that she was anxious to have his reply before making the adoption. As a matter of fact she made the adoption only some 2 or 3 days after she received his reply, Exh. EE-11. It is true she had made arrangements to perform the adoption sometime previous to receiv-

ing plaintiff's reply. She might have done so in the hope that plaintiff would not object. The District Judge mentions it as a point against the 1st defendant that she did not send EE-9 by a special messenger, but by registered post. Surely she cannot be blamed for sending an important letter like Exh. EE-9 by registered post. Whatever other objection may be urged to the adoption, I think objection No. 1 is a futile one and must be rejected.

Taking objection No. 5 next, I agree with the District Judge that there is no force in it either. It is true that in the agreement Exh. O-1, para. 8 (counter part Exh. O), there is a covenant by the 1st defendant's husband Venkata Rao not to adopt with a counter-covenant by the plaintiff's father not to adopt either. These are personal covenants and it is not explained how it could bind the 1st defendant. It is said that it implies a prohibition against the widow by the husband not to adopt. Now plaintiff's father did not consider himself bound by the covenant and he adopted Ramakrishna in spite of it. Why should Venkata Rao be treated as in a different position and his covenant be treated as even amounting to a prohibition to his widow. I agree with the District Judge that an implied prohibition is sufficient to prevent a widow adopting; it is not necessary to prove an express prohibition. *The Ramnad case,* 12 M.I.A., 397 at page 443, shows it and the statement in *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* and *Radha Mohun* v. *Hardai Bibi,* I.L.R., 22 Mad., 398 at page 408, is not intended to lay down a different rule. See *Shiyali Subraya Chetti* v. *Calve Subraya Chettiar,* 37 I.C., 404. But I consider the circumstances here do not show any implied prohibition at all. This objection also fails.

Before taking up the other objections for consideration, I think it necessary to set out what I consider to be the facts proved in connection with the adoption. Plaintiff swears that sometime before the adoption, in 1913, the 1st defendant applied to him for pecuniary help and though the latter denies it I think it is true. Plaintiff's evidence is corroborated by the fact that the 1st defendant's brother Sitaramaswami also spoke about money help to plaintiff's then Dewan P.W. 111, who is a first-grade Deputy Collector whose services had been lent by the Government to the plaintiff. His evidence on the point is accepted by the District Judge and there is no reason for us not to do so. Some letters, Exh. EE series, were produced in corroboration of plaintiff's statement, but the 1st defendant denies her connection with those which ask for money. I agree with the District Judge that the letters were sent by her or with her knowledge, for reasons given by him and I find that the 1st defendant did ask plaintiff for money in 1913. The last letter was in Dec. 1913 and it was then that the 1st defendant knew for certain that she could not expect any financial help from plaintiff. We find the idea of the adoption developed shortly thereafter. It

Sri Krishnayya Rao v. Rajah of Pitapur. —— Krishnan, J.

may be as D.W. 1 says, that the idea was first mooted a year previous to the actual adoption, but nothing much was done then regarding it. According to his evidence the present adoption was settled about 20 or 30 days before it took place (*see* p. 421 of his evidence). That would be about the 15th or 20th of Jan. 1914. It is not too far fetched a suggestion therefore to make that the idea of carrying out the adoption had some connection with 1st defendant's failure to raise money from the plaintiff. That she evidently wanted money is made manifest by the fact that she borrowed some Rupees 2¼ lakhs from the Raja of Venkatagiri in July 1914 soon after she was in a position to offer him proper security by obtaining half the Gollaprolu Estate absolutely as the result of the adoption. We find the day after the adoption, the adopted boy executing two deeds, one settling half the Gollaprolu Estate absolutely on the 1st defendant Exh. XVII and the other Exh. XVII (*a*) binding him to give her a maintenance of Rs. 500 a month. It is also in evidence that his marriage with the daughter of 1st defendant's brother Sitaramaswami had been arranged to take place on the day after the adoption. It had to be put off on account of the absence of the Maharaja of Venkatagiri but it actually took place early in March. It is the plaintiff's case that these were all conditions attached to the adoption. Defendants contend that the adoption stood by itself, independent of these arrangements, which were made separately by the adopted boy of his own free will and choice. It is in this connexion that a good deal of argument was addressed to us as to when the adoption was "settled." If the word " settled" is to be understood as meaning that the negotiations about the adoption resulted in an understanding that Ramakrishna was to give his son in adoption and the 1st defendant was to take him in adoption it may be that it was "settled" in January as D.W. 1 says. It is however clear that all the terms were not then settled nor possibly even proposed. It does not follow that the 1st defendant did not mean to ask for the other terms as well. Subsequently we find that before the adoption was actually made it was agreed between the parties that the terms about settlement, maintenance and possibly marriage should be carried out. D.W. 1 himself speaks to this. Probably there was no talk about the Venkatagiri loan at the time as it was an arrangement to be made with a third party, the Raja of Venkatagiri. Whatever the position may be as regards the marriage of the 2nd defendant, the arrangements about the settlement and the maintenance must have been made sometime before the 6th of Feb., for we find the stamp papers purchased for the two deeds XVII and XVII (*a*) on the 6th February along with the stamp for the adoption deed Exh. XVI. It is too much to ask one to believe that the settlement and maintenance arrangements had no intrinsic connection with the adoption; there can be no doubt, as the District Judge remarks in para.

Sri Krishnayya Rao v. Rajah of Pittapur.

Krishnan, J.

110 of his judgment "that the terms embodied in Exh. XVII and XVII (*a*) were settled as part of the adoption arrangement" before the adoption was made; the whole is one transaction. Whether the marriage is part of that transaction or not is perhaps open to doubt. It seems to me therefore we have to judge of the validity of the adoption on the footing that it was carried out by the 1st defendant in part at least with the object for the purpose of getting half her deceased husband's estate into her absolute control so that she may dispose of it as she pleased, by either mortgaging it to raise money as she did under Exh. XVIII or by alienating it *in toto* as she did by will in favour of one of her nephews. The 1st defendant may well be credited with an intention to benefit her deceased husband's soul as that is always a consideration for an adoption but her main object was undoubtedly to get her husband's property or as much of it as she could get, into her own hands absolutely.

On these facts it is urged that the widow's motive in making the adoption must be held to be corrupt and improper and the adoption held to be bad in consequence, and that in any case the plaintiff was justified in relying on such motive in refusing his consent to the adoption and that plaintiff having properly refused his consent, the assent of one only, *viz.*, Ramakrishna of two sapindas is not enough to validate the widow's adoption. These are, in other words, the three remaining objections raised by the plaintiff. I am inclined to think there is force in these objections.

It was in the *Ramnad case*, 12 M.I.A. 397 that the Privy Council first laid down that in the Dravida country a Hindu widow not having her husband's authority may nevertheless if authorized by the consent of his kinsmen validly adopt a son to him. There is also in that case the oft-quoted passage that

> "all that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

There is nothing in any Hindu texts that deals with assent of kinsmen and therefore the law as to the nature and extent of assent that is necessary to validate an adoption must be gathered from the Privy Council and other decisions.

The Second Privy Council case on the point is *The Berhampore case—Sri Virada Pratapa Raghunada Deo* v. *Sri Broso Kishoro Deo*, I.L.R., 1 Mad., 69. The decision itself is not in point as the husband's authority was found but there are some observations in it which are of importance. Their Lordships say (page 83)

> "that though the religious duty of adopting a son may be the essential foundation of the law of adoption and the effect of adoption on devolution of property a mere legal consequence it was not impossible to see that there are grave social objections to making the succession of property and

it may be in the case of collateral succession as in the present instance the rights of parties in actual possession dependent on the caprice of a woman subject to all the pernicious influences which interested advisers are too apt to exert over women possessed of or capable of exercising dominion over property."

This was followed by the *Guntur* or *Vellanki case—Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi*, I.L.R., 1 Mad., 174. Here again it is the observation of the Privy Council on p. 190 that is of importance. Their Lordships say

"it would be very dangerous to introduce into the consideration of these cases of adoption nice questions as to the particular motives operating on the mind of the widow and that all that this committee intended to lay down was that there should be such proof of assent on the part of the sapindas as should be sufficient to support that the adoption was made by the widow not from capricious or corrupt motives or in order to defeat this or that sapinda but upon a fair consideration by what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

The next case which went to the Privy Council is the case of *Venkamma* v. *Subramaniam*, I.L.R., 30 Mad., 50, where their Lordships accepted the view of this Court that the failure to consult one of the nearest sapindas, could not be justified on the ground that he would have refused if consulted and was fatal to the adoption. In the next case, the *Urlam case—Veerabasavaraju* v. *Balasurya Parsada Rao*, I.L.R., 41 Mad., 998, they reiterate that the failure to consult one of the nearest reversioners on the ground that it was known that he would refuse was a futile reason.

There is an observation in this case that if the majority of sapindas assent and one refuses his objection may be discounted. As some reliance was placed by Mr. Ramachandra Aiyar for the appellants on it I shall deal with it later on when considering his argument on the point.

The latest Privy Council case is that of *Adusumilli Krishnayya* v. *Adusumilli Lakshmipathi* reported in 39 M.L.J., 70. Their Lordships say

"what is required is the consent of a majority of agnates nearest in relationship who are capable of forming an intelligent and honest judgment in the matter and that save in exceptional cases the consent of the nearest sapindas must be asked and if not asked it is no excuse to say that they would have refused."

They also observed that if from a corrupt or malicious motive a near relative refuses his consent, his dissent may be disregarded. These are the Privy Council cases on the question of widow's adoption with the consent of sapindas. It is clear that so far as sapindas are concerned all the nearest ones must be consulted but if any one of them gives or refuses his consent from corrupt or

Sri Krishnayya Rao v. Rajah of Pittapur. — Krishnan, J.

malicious motives his action may be ignored. The rule that a sapinda's dissent from interested or improper motives can be discounted is clearly brought out in the case of *Parasara Bhattar v. Rangaraja Bhattar* in I.L.R., 2 Mad., 202, where it was held in the case of two sapindas, one assenting and the other dissenting, that the adoption was valid as the refusal was from interested and improper motives.

The question however of the effect of the widow's motive on the validity of the adoption is not quite easy to decide. In Bombay it has been held in F. B. in *Ramachandra* v. *Mulji Nanabhai*, I.L.R., 22 Bom., 558, that the discussion of the widow's motive in making an adoption is irrelevant. It is true that there is a difference between that Presidency and this on the law as to widow's powers of adoption. In that Presidency in the absence of authority from the husband the widow can adopt a son to him at her own choice if she has not been prohibited by him from adopting, whereas in this Presidency the widow requires the assent of kinsmen before she can adopt. This difference however does not seem to me to make any difference on the question whether the Court can canvass the widow's motive when she has obtained the consent of the kinsmen when her power is co-extensive with that of her husband (see 22 Mad., 398, p. 408). But it would certainly be a very proper ground for a kinsman to consider when he is called upon by the widow for his consent and I conceive that a kinsman would be justified in refusing his assent if he find that the widow's motive in proposing the adoption is in part at least corrupt or improper.

In this connection the case in *Bhasba Rabidat Singh* v. *Indar Kunwar*, I.L.R., 16 Cal., 556, was also cited. That case seems to show that even if the widow was actuated by a corrupt motive that in itself will not vitiate the adoption but the condition attached will be invalid. Following the Bombay Full Bench I must hold that the corrupt motive of the widow in stipulating for the gift to her of half her husband's estate cannot be relied on by the Court to declare the adoption invalid.

But the position is entirely different when we are considering the question whether there is sufficient evidence of assent of kinsmen to support the adoption in the present case. One argument of the learned vakil for the appellant based on the observation in the *Urlam case*, 41 Mad., 998, is that if the majority of sapindas consent but one dissents, his dissent may be ignored. Now the nearest reversioners to 1st defendant's husband Venkata Rao are plaintiff and Ramakrishna. Plaintiff's sons and Ramakrishna's sons would be the reversioners of the next degree. Plaintiff has refused his assent. His sons are all minors. Of Ramakrishna's sons Gangadhara Rao, No. 13 and Rajagopal No. 14 are majors. It was argued that these latter were also consenting parties to the adoption and therefore there was a majority in favour of the adoption and the dissent of

Sri Krishnayya Rao v. Rajah of Pittapur.
—
Krishnan, J.

plaintiff may in consequence be ignored. Now as a matter of fact Gangadhara was never consulted as his whereabouts at the time, it is said, was not known. 1st defendant says she asked Rajagopal orally and he consented. He is no doubt one of the attesting witnesses to the deed of adoption and I think he may be regarded as a consenting party. But I do not think that the Privy Council meant to lay down that a count was to be taken of the votes of both the nearest and the remoter sapindas and the matter of the validity of the adoption decided by the number in favour of adoption irrespective of their position.

It seems to me that if the question is to be decided by a majority it must be by a majority of the nearest sapindas and there must be such a substantial majority as to justify the conclusion that the adoption is proper and is made in the *bona fide* performance of a religious duty if the refusal to consent of the dissenting minority is shown to be based upon proper and valid grounds, the mere fact of a majority being in favour of the adoption should not I think prevail. In the present case there are only two nearest sapindas, one assenting and one dissenting, and no question of majority therefore comes in. If the dissent of the dissenting sapinda the plaintiff is shown to be unreasonable it may be ignored and I agree with the District Judge that in that case the assent of Ramakrishna alone would be sufficient to validate the adoption. But if on the other hand plaintiff's objection is well founded there can be no doubt on the authorities that the adoption cannot be supported.

Several reasons were stated by the plaintiff for his refusal in his reply Exhibit EE-11 to the 1st defendant and in the plaint. Many of them are futile. The objection that the boy selected is the son of an enemy of plaintiff's is I think not a valid objection as he is already a member of the plaintiff's joint family. The adoption, if anything, makes him a more remote member than he was before. The objection that the adoption would deprive plaintiff of his inheritance is a personal one and it has been always held that such an objection is not a valid one. See *Venkatarama Raju* v. *Papamma*, I.L.R., 39, Mad., 77 and *Venkatapathi* v. *Punnamma*, 1915 M.W.N., 236. But one objection is, I think, a valid and strong one, namely, that in making the adoption the widow was actuated by the desire to get her husband's property into her own control, so that she may deal with it as she pleased As I have stated above it is certainly open to the kinsman to take the widow's motive into consideration in refusing his assent. The widow's motive was in this particular distinctly corrupt and if a sapinda could not take into consideration such a motive in refusing his assent there will be no way of preventing widows making adoptions, improperly to benefit themselves and their own relations. It was argued that it was not a matter of sapinda's concern but only the adopted boy's concern whether he keeps the estate he gets by adoption or gives it away. It was also

Sri Krishnayya Rao v. Rajah of Pittapur. Krishnan, J.

pointed out that the boy adopted here was a major and was thus able to exercise his own choice. I do not think these arguments are of any force; for the question whether the adopted boy should be subjected to a condition to give away the estate to the widow is a matter for consideration before adoption and by the sapindas. If neither the Court nor the sapindas could consider the impropriety of a widow's action in making an adoption for the purpose of getting her husband's estate into her control there will be no way of preventing such adoption. Whatever weight one may attach to the religious benefits flowing from an adoption one cannot ignore the secular rights flowing from it. Their Lordships of the Privy Council have pointed this out in the Urlam case, 41 Mad., 998. They have also referred with approval to the opinion of Golap Chander Sarkar in his book on Hindu Law that adoption is more a temporal than a spiritual concern. The temporal side cannot in any case be overlooked.

I have for the above reasons come to the conclusion that plaintiff was justified in withholding his consent to the 2nd defendant's adoption and in face of his dissent it is clear that there is not such an assent of kinsmen as to support the adoption. I agree with the District Judge that the adoption must be set aside, though not with all his reasons. I would therefore dismiss the appeal with costs of the plaintiff—1st respondent.

Venkatasubba Rao J.

Venkatasubba Rao, J.—The suit out of which this appeal arises was brought by the Raja of Pittapur to obtain a declaration that the adoption of the 2nd defendant made by the 1st defendant, the widow of his uncle Venkata Rao, is invalid and not binding upon his reversionary interest. The suit having been decided in favour of the plaintiff by the District Judge of Godavari, the present appeal has been filed by the defendants questioning the correctness of the decision. The facts which have led up to this suit, I shall briefly narrate. The following pedigree will serve to explain the relationship of the parties:—

[*See* pedigree printed at page 904.—Rep.]

Gangadhara Rama Rao was the late Raja of Pittapur and he adopted in 1873 Ramakrishna, the second son of the Raja of Venkatagiri. It was alleged that on the 5th October 1885 a son was born to his senior wife Mangayamma and that son is the present plaintiff. Gangadhara Rama Rao died in July 1890 having previously made a will bequeathing to the plaintiff whom he recognized as his son, the Zamindari of Pittapur. The Court of Wards took possession of the estate on behalf of the plaintiff who was then an infant and Ramakrishna filed a suit in 1891 (O.S. No. 6 of 1891) to obtain a declaration that the plaintiff was the son neither of the late Raja nor of his wife and that he was the rightful owner of the estate. The District Judge of Godavari who tried that suit upheld the contention of Ramakrishna and passed a decree

Sri Krishnayya Rao v. Rajah of Pittapur.

Venkatasubba Rao, J.

in his favour. The case was taken to the High Court by the present plaintiff and the appeal was disposed of in his favour on the ground that he took the estate as *persona designata* under his father's will. The High Court considered it unnecessary to decide the question relating to the plaintiff's status. The Privy Council agreed with the High Court and the result was that the plaintiff got the estate, but the issue regarding his paternal or maternal origin was left undecided.

Now to go back to the late Rajah, he granted in December 1869 to his brother Venkata Rao Gollaprolu estate (see Ex. O and O-1), a part of the larger Pittapur estate. It is conceded before us by the plaintiff's learned vakil that what was granted to Venkata Rao was an absolute estate though this point was disputed in the Lower Court. Venkata Rao died in 1871 without issue leaving the 1st defendant, his widow, surviving him. In 1886 she made an adoption alleging that she had her husband's authority to adopt. The validity of this adoption was questioned by the plaintiff, legal proceedings followed and it was ultimately set aside in 1891. The 1st defendant made a second adoption in 1914, the boy adopted, the 2nd defendant being the son of Ramakrishna already mentioned. It is alleged for the defence that valid assent of sapindas or kinsmen was obtained and that the adoption is therefore valid. It is the validity of this adoption that is impeached in the present suit.

The defence while contending that the 2nd defendant's adoption is valid also disputes the plaintiff's right to maintain the suit. It is alleged that the plaintiff is not the son of the late Rajah and is therefore not the reversionary heir entitled to question the adoption. This suit thus raises the very question which was raised in the previous suit but was left open.

The two important questions that have to be decided have thus reference to the plaintiff's status and the validity of the 2nd defendant's adoption.

I shall first deal with the issue relating to the adoption. It will be convenient to set forth briefly the main facts connected with this point. The 1st defendant was a resident of Undoor, a place near Pittapur. Her case is that after the court declared that the earlier adoption made by her was invalid, she continued to have the desire of adopting a boy and that she took legal opinion about the year 1901 and was advised that she could adopt after obtaining the consent of her husband's kinsmen. Till 1914, nothing very important occurred. She applied by Ex. 15-B, dated 27th January, 1914, for Ramakrishna's consent and he sent a reply Ex. 15-A, dated 30th January, 1914 consenting to the adoption. She similarly wrote to certain distant sapindas on the 3rd of February 1914 and they also sent replies consenting. A sapinda so consulted was Subbayamma, one of the surviving widows of the late Rajah and she also wrote notifying her consent. On the 2nd of February she

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkatasubba Rao, J.

wrote to the plaintiff asking for his consent (*see* Ex. EE-9). The 1st defendant despatched these various letters from Undoor and she left that place for Madras on the 3rd of February and reached Madras on the 4th. In the letter to Ramakrishna she not only asked him in his capacity of a sapinda for his assent but she made a request that he should give his own son, the 2nd defendant, in adoption. In his reply Ramakrishna *as sapinda* consented to the adoption, and as the *natural father* of the boy agreed to the latter being adopted. The dates I have mentioned are important on account of certain points in regard to which there has been much controversy. It will be seen that before she left Undoor the 1st defendant had applied for the plaintiff's consent. Finding that he sent no reply, she sent him a reminder from Madras (Exhibit EE-10), dated 7th February, 1914. The plaintiff sent his reply from Pittapur (Ex. EE-11), dated 11th February 1914 which was received by the 1st defendant at Madras on 12th February 1914. By his letter the plaintiff refused to consent but the 1st defendant nevertheless made the adoption on the 15th of February and on the 16th two deeds were executed, which will be referred to in this judgment, as *settlement* and *maintenance* deeds (Ex. 17 and 17-A). By the first of these deeds, the adopted boy gives away absolutely to the 1st defendant half of the Gollaprolu estate; by the second he agrees to pay his adoptive mother maintenance at the rate of Rs. 500 per month charging it upon his half share of the estate. The defence maintains that the arrangement was come to after the 1st defendant reached Madras; in other words some time after the adoption itself was settled.

The 2nd defendant married the niece of the 1st defendant on the 4th of March 1914 and the plaintiff suggests that this was also a term of the adoption. In July, 1914, the 1st defendant and her brothers mortgaged the moiety that fell to the 1st defendant's share (along with certain properties belonging to her brothers) and borrowed a sum of about Rs. 2½ lakhs from the Raja of Venkatagiri, the brother of Ramakrishna. It is suggested that this was also a term of the adoption.

The plaintiff's case is that these terms were settled simultaneously with the settling of the adoption and that as a matter of fact there was a single transaction and that the terms cannot be separated from the adoption itself, and it is invalid as it was merely intended to be a cloak for the securing of a portion of the property by the 1st Defendant and her relations.

I am here merely indicating the contentions, but I shall notice the various points connected with them later on.

As the points raised relate to the motives of the widow-not an easy subject to deal with—it will become necessary to very carefully follow the course of events and the evidence relating to them.

Sri Krishnayya Rao v. Rajah of Pittapur. —— Venkatasubba Rao, J.

The adoption is attacked also on other grounds. It is said that the 1st defendant's husband had undertaken not to adopt and that she is bound by that promise. It is further urged that in any event, from her husband's promise, may be implied a prohibition against the 1st defendant adopting. Next it is urged that Ramakrishna on the date of the adoption was physically and mentally unfit to take part in the ceremony or to understand the effect of his act.

I shall deal with these various points under the following headings:—

I. When was the adoption settled?

II. When were the terms settled and what relation do they bear to the adoption itself?

III. Was Ramakrishna physically or mentally unfit either to consent or to give the boy in adoption?

IV. The consent of the sapindas.

V. Express understanding not to adopt and implied prohibition.

I. When was the adoption settled?

Pakam Kuppiah, D.W. 1, took an important part in bringing about the adoption. He was in the service of the Rajah of Venkatagiri, whose confidence he seems to have enjoyed. He says that the subject of this adoption was first broached a year before it actually took place. His evidence in regard to this is very circumstantial. The 1st defendant had a nephew (sister's son) by name Prakasa Rao. He was also related by marriage to the Raja of Venkatagiri. He was living at Undoor in a house adjacent to that of the 1st defendant. The witness has been acquainted with Prakasa Rao since the latter's marriage and was in the habit of going to Undoor to visit him. When he was at Undoor on such a visit, the 1st defendant sent him word through Prakasa Rao that she desired to adopt the 2nd defendant and that the witness should speak to the Raja of Venkatagiri regarding the subject. He accordingly carried the message to the Raja who in his turn referred him to Ramakrishna. The witness then spoke to Ramakrishna who after some consideration signified his assent.

Nothing further transpired for the time being and the adoption was finally settled about 20 or 30 days before it took place.

Seetharamayya, D.W. 27, is the brother of the 1st defendant and his evidence is substantially the same as that of D.W. 1. After the 1st defendant was defeated in the previous adoption suit, she continued to cherish the idea of making an adoption and consulted as early as in 1901 Mr. S. Srinivasa Aiyangar who represents the Raja of Pittapur in the present suit. This fact has not been denied. He confirms the previous witness in regard to these two facts, that this adoption was first thought of a year previously and that it was finally settled one month before it took place.

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkatasubba Rao, J.

D.W. 22 is the nephew of the 1st defendant and Seetharamayya. He also speaks to the fact that this adoption was first mooted about a year previously.

The 1st defendant herself gives important evidence on this point. For long she had a desire to make an adoption, but she expected trouble from the plaintiff, a man of great power and influence. She consequently put off the adoption and when her health began to give way she thought it was no longer prudent to postpone it. She opened negotiations about a year previous to the adoption and about a month prior to it it was finally settled. She asserts that the sequel justified her fears in regard to the attitude of the plaintiff. The moment she made the adoption, the plaintiff, she says, brought three criminal cases against herself and her brothers making grave charges against them. When the criminal cases ended favourably to them, the plaintiff launched the present action.

Now we turn to the evidence of the 2nd defendant, which in my opinion is very valuable. He was about 21 years old at the time when he was adopted. He says that he first heard of the proposal to adopt him about 7 or 8 months before the adoption and that it was finally settled about a month prior to it. His father Ramakrishna conveyed to him the desire of the 1st defendant and asked his opinion. His answer was that if the elders were in favour of it he would also agree.

I have now set forth the evidence which remains uncontradicted and the only conclusion possible is, that the 1st defendant resolved to make the adoption before leaving Undoor for Madras and about a month prior to the date on which it actually took place. As I shall show presently, there was then no talk or discussion regarding any terms subject to which the adoption was to be made and it follows from this that any arrangement subsequently made cannot be regarded as having influenced her mind in arriving at the decision.

II. When were the terms settled and what relation do they bear to the adoption itself?

Pakam Kuppiah, D.W. 1, gives very clear evidence on this point. The adoption was finally settled when the 1st defendant was at Undoor about a month before it actually took place. She came to Madras 10 or 15 days before the ceremony of adoption. It was after her arrival at Madras that the terms were discussed. Till then there was no mention of the terms at all and according to this evidence it was impossible that the 1st defendant could have been influenced by any factors extraneous to the adoption when she finally agreed to adopt before leaving Undoor. This witness (D.W. 1) describes the course that events took. The 1st defendant mentioned to him that she had debts to the extent of about 2 lakhs

Sri Krishnayya Rao v. Rajah of Pittapur.

Venkatasubba Rao, J.

and that the boy to be adopted, while taking the entire estate, should be also prepared to discharge those debts. He mentioned this matter to Ramakrishna who directed him to interview the boy himself as he was a major. He therefore spoke to the boy who said that he would prefer not to be encumbered with debts but had no objection to allow the 1st defendant to take absolutely half of the estate out of which she could herself meet the debts. This proposal was agreed to by the 1st defendant. In regard to her maintenance she wanted Rs. 500 and the 2nd defendant agreed to pay that sum. In cross-examination the witness makes a distinct statement that these terms were settled only about 8 or 10 days before the adoption. In regard to the loan of 2½ lakhs of rupees, he asserts that there was no talk regarding it prior to the adoption and that the matter was first mooted more than three months *after* the boy was adopted. In regard to the 2nd defendant's marriage it was also arranged not before but after the 1st defendant's arrival at Madras. The evidence of D.W. 27 is to the same effect. It is unnecessary to refer to it at length and I may state that almost word for word his evidence agrees in this respect with what the previous witness has stated. It was this man's daughter that the 2nd defendant married and he asserts, that before he and his sister had left Undoor there was no talk of this marriage. The first reference to it, he says, was at Moti Mahal at Madras. The Raja of Venkatagiri pointed out that the 2nd defendant would after the adoption live amidst strangers and that it would be in the interests of the boy, that an alliance such as this should be formed. It was this suggestion that was accepted and acted on. In regard to the loan of Rs. 2½ lakhs the witness says that it was a transaction quite distinct from the adoption.

The evidence of the 1st defendant herself supports this version regarding the terms. She speaks to the fact of her asking the 2nd defendant to take the whole estate and discharge her debts—a suggestion that did not meet with his approval. He preferred to take half the estate free of debts. Her evidence in regard to the loan and the marriage similarly accords with what the previous witnesses have said. The story told by the various witnesses in regard to other particulars also receives support from her evidence.

I shall next deal with the evidence of the 2nd defendant. He is, as I have said, a very important witness on the various matters connected with the adoption. He describes the progress of events and shows that at the start there was no intention to make the adoption subject to any terms. As negotiations progressed, the idea of entering into some arrangement was suggested by the 1st defendant and before the date of the adoption the terms were finally and completely settled. The 1st defendant was not anxious to retain half the property; on the contrary she assumed that after

Sri Krishnayya Rao v. Rajah of Pittapur. Venkatasubba Rao, J.

the adoption the adopted son would take the whole estate and on that footing proposed that he should discharge her debts. *It was his suggestion* that the 1st defendant should take half the estate, for, in that event he could be the master of the other half subject to no liabilities. He preferred this course and his father Ramakrishna had no objection to it. At the instance of his uncle, the Raja of Venkatagiri, he agreed to pay Rs. 500 a month as maintenance. He also describes the part played by D.W. 1 in these negotiations. He is emphatic that there was no talk regarding these terms at all before the adoption was settled and the subject was first discussed only about a week or ten days prior to it. In regard again to his marriage, his evidence is equally clear and definite. It was settled only about four days before the adoption and was celebrated about 20 days later. This witness also denies that the matter of the loan was in any way connected with the adoption. He heard of it for the first time some months after he was adopted and he had no personal knowledge whatever of the transaction. This is a very brief summary of his evidence which there is no reason to distrust. As the witnesses have been subjected to weary cross-examination, there are apparent contradictions, even when they are in the main speaking the truth; but in the case of this particular witness, it may be said that it is not open to attack to the same extent, that it is marred by contradictions or evasions; on the whole his evidence reads like that of an honest witness who is willing to speak the truth.

While I am on this topic I would like to refer to the evidence of D.W. 9, Mr. P. V. Krishnaswami Chetti. I do not wish to deal with his evidence piecemeal but I shall state its effect in this connection fully, though I may have to refer to it again under other headings. His evidence throws light on several points at issue and carries much weight from the fact that he at one time was a great figure in legal circles at Madras, although he was obliged later to retire from active practice owing to deafness and act as Chamber-Counsel. The importance of his evidence was realized by both sides and it was therefore subjected to the closest analysis. The events to which he speaks, I may set forth in their chronological order:—

(1) Pakkam Kuppayya (D.W. 1) and Seetharamayya (D.W. 27) interviewed him on behalf of the 1st defendant *more than two months before the adoption*. They said that they had been advised by the Maharaja of Venkatagiri whose standing vakil he was, to consult him. At that interview they informed him that although Venkatagiri was willing, Ramakrishna was hesitating to give his boy in adoption.

(2) Ramakrishna himself interviewed the witness some weeks (two, three or four) before the adoption. I do not think

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkata Subba Rao, J.

that the witness can be blamed for not being definite about the time. In course of conversation, the witness asked Ramakrishna what his objections were. He had replied that he had no objection to the lady making an adoption but he objected to giving *his son* in adoption. The reason was, that the 1st defendant belonged to the party of the plaintiff's mother and aunt. He yielded, however, as his brother the Maharaja of Venkatagiri was in favour of the adoption. He asked the witness to write to the Maharaja and inform him that he had made up his mind to give away the boy. The witness accordingly wrote to the Maharaja that day.

(3) Some days after this visit, the witness advised the 1st defendant's brother D.W. 27 to apply for Ramakrishna's consent formally. He suggested the lines on which the application was to be drafted.

(4) The witness saw Ramakrishna at his house a week before the adoption. There is nothing of importance that took place during this visit.

(5) The consent in writing of Ramakrishna (not drafted by the witness) was shown to him 3 or 4 days before the adoption and in a day or so after that he prepared a rough draft of the adoption deed.

(6) He became aware of the intended gift of some property to the widow, only some time after she gave him instructions regarding the adoption deed; may be, three or four days before the adoption. He was not consulted about that and it was the first time he heard of it.

(7) He heard of the 2nd defendant's marriage two or three days after the adoption.

(8) He was consulted again as to the draft of the reply to be sent to the plaintiff who wrote objecting to the adoption. The witness is not prepared to divulge what transpired between him and his client in the matter of his advice regarding the obtaining of the assent to the adoption.

The witness was speaking to events which took place more than four years before he was examined and he may not be quite accurate in regard to some dates, but in general I find no reason to reject any part of his testimony. The facts that emerge from his evidence are, that he was professionally consulted by the 1st defendant regarding the adoption more than two months in advance of it, that in the several interviews he was not asked nor did he advise regarding any terms, that the terms came to his notice for the first time only a few days before the adoption and that the 1st defendant and her friends were anxious to obtain the best possible legal advice to ensure that valid assent—assent sufficient in law—of the kinsmen, was obtained to the adoption. This evidence renders it very probable that what the other witnesses said is true, namely, that when the

Sri Krishnayya Rao v. Rajah of Pittapur.

Venkata-subba Rao, J.

1st defendant first thought of the adoption she was not thinking of any terms at all and that when she decided to adopt, her mind could not have been influenced by any arrangement subsequently come to. There is thus a large body of evidence on this very important subject supporting the defence and this evidence is practically uncontradicted. I say "practically" because there is one witness examined for the plaintiff who professes to speak from personal knowledge to the events connected with the adoption. He is Narasinga Rao, P.W. 113. The learned Judge, though believing him on certain points, is not well impressed with his evidence. He holds a University degree and I have to overcome a natural reluctance on my part to condemn him as a false witness, but I regret to say that after very careful consideration I have formed the opinion that he is unworthy of credit. Though this witness's evidence is relevant under this as well as other headings, it will be convenient to deal with it wholly at once. He is the sheet-anchor of the plaintiff's case on adoption and I therefore propose to make a careful analysis of his evidence which relates to four points. *First,* he asserts that Ramakrishna was physically and mentally unfit to consent to the adoption on the 30th of January 1914. Ex. 15-A the writing which bears Ramakrishna's signature, is dated the 30th of January 1914 and is used by the defence as evidence of his consent. Can this witness be believed when he deposes that Ramakrishna was not in a fit condition on that date to accord consent? He himself attested that exhibit being the first of the attestors and now pretends that he did so, relying on the representation of some servant (whose name he does not know), that Ramakrishna signed it. *Secondly,* Ex. 17 and 17-A, the settlement and maintenance deeds, respectively, bear the date the 16th of February 1914. He deposes that they were actually executed between the 6th and the 8th February long before the adoption. Even the plaintiff on whose behalf he made this assertion seemed to have been taken aback; for, he would not go so far and admitted in his plaint that the documents were duly executed on the dates they bore. In these two deeds the 2nd Defendant was described by a name which he took after the adoption and there is also a recital that he had been adopted. The witness says that he attested these deeds with the knowledge of the false recital. What is worse, at the time he attested them, space was left blank for inserting later the date of execution with the deliberate object of creating false evidence. He obviously helped to bring into existence a document which was intended to be post-dated. The learned Judge has disbelieved him on this point. *Thirdly,* he has deposed that Ramakrishna was mentally and physically unfit to take part in the ceremony on the date of the adoption. This evidence does not require serious notice, contradicted as it is by testimony of several respectable witnesses, and the trial Judge has disbelieved him also

Sri Krishnayya Rao v. Rajah of Pittapur.

Venkatasubba Rao, J.

in this respect. *Fourthly,* he deposes that the terms of the adoption were settled one month prior to it and it is this portion of his evidence that the plaintiff strongly relies on. The witness speaks to three incidents. He says that D.W. 1 told him that he asked Ramakrishna to give his boy in adoption to the 1st defendant, but that he (Ramakrishna) summarily rejected the proposal saying that he was not willing. Incidentally, I may remark that if this evidence is true, it helps the defence very materially. Next he deposes that he was casually present at a conversation between D.W. 1 and the 2nd defendant; this, he says was before the 10th January. He then heard D.W. 1 tell the 2nd defendant that the 1st defendant was willing to adopt only if certain conditions were complied with, namely, that the 1st defendant was to have half the estate and that the 2nd defendant was to marry the 1st defendant's niece.. The boy refused to abide by these terms. On this very important occasion, besides the witness there was nobody else present. Then we pass on to the next stage. The 2nd defendant consulted the witness as regards the proposed adoption and the latter gave him the sage advice "something was better than nothing," urging him to accept the terms. Thereupon, the 2nd defendant mentioned to D.W. 1, that he was willing. At these interviews again nobody was present excepting the witness. Even as regards the loan from the Rajah of Venkatagiri the witness had something to say; he heard of it long before the adoption. Thus we see that on every material point connected with the terms, he supports the plaintiff by his evidence. Whereever it has been possible, he has been shown up, as in the case of Ex. 15-A ,17 and 17-A. His part in them on his own showing, to say the least, does him little credit. He was a tutor to the sons of Ramakrishna including the 2nd defendant. He started on a small salary of Rs. 35, which was later raised to Rs. 50. To give an air of probability to his version, he found it necessary to say falsely, that he was also the Private Secretary of the late Ramakrishna. For holding that important post he received a grand sum of Rs. 10 a month in addition to his salary as tutor. He was confronted with his signatures showing that he received only Rs. 50, the tutor's salary, and he invented the story that he gave two sets of receipts, one for Rs. 50 and the other for Rs. 10. How comes it that this man who was in the service of Ramakrishna figured as an important witness on the plaintiff's side? The story is graphically told in the evidence of the 2nd defendant, which I entirely believe.

After the adoption, Narasinga Rao accompanied the 2nd defendant to Undoor. Finding that the young man had come into a large estate, he offered his services as Manager and demanded that he should be permitted to take the profits less what was required by the second defendant for himself and his family or in the alternative should be paid a fixed salary of Rs. 500 a month. To carry

Sri Krishnayya Rao v. Rajah of Pittapur. Venkatasubba Rao, J.

out this design, he proposed that the second defendant should separate himself from his mother and that a new building should be constructed at Gollaprolu where they were to take up residence. In addition, he wanted a loan of Rs. 4,000 for himself. The second defendant did not agree to these absurd terms and the relations between them became at once strained. The witness, it must be noted, has been unable to wholly deny in his cross-examination at least some parts of this episode. On the strength of the testimony of a man of this kind, it is impossible to reject the whole body of affirmative and cogent evidence adduced by the defendants in regard to this point.

I have dealt with the evidence relating to the terms at some length as the so-called arrangement has been made the target for a very spirited attack on the part of the plaintiff's learned vakil.

What then is the result of this evidence? It unmistakably shows that the adoption had a distinct origin independent of the terms and that the transaction as originally conceived by the first defendant was an adoption pure and simple unattended by any conditions. It further shows that as the day of the adoption was approaching, the first defendant wanted to have an arrangement made regarding payment of her debts. Being aware that they would not be legally binding on the boy, she desired to get an undertaking from him that he would discharge them. This was a natural, nay, a proper desire on her part as she regarded the debts as morally binding on her though they were not legally binding on the estate with which she was parting. The suggestion that the first defendant was to take half the estate emanated from the second defendant who was anxious to retain his half unencumbered by debt —a fact which shows that the arrangement was not, and could not have been a device planned by the widow and her relations to secure any portion of the property.

As I am dealing with the question of the widow's motives, I may notice here another contention urged by the plaintiff. He alleges that the 1st defendant applied to him for a loan (or a present) of about two lakhs, that he failed to comply with that request and that she made an adoption with a view to spite him (see paragraph 9 (ii) of the plaint). The 1st defendant denies that she made any such request and to disprove this allegation the plaintiff has filed Ex. EE to EE-8 which are said either to contain her signature or to be in the handwriting of P.W. 22, her nephew, generally employed by her to write her letters. In my opinion, it would be sheer waste of time to try to decide regarding the genuineness of these letters; for, independently of them there is the evidence of the plaintiff and of his Diwan, P.W. 111 (which may be accepted) to the effect that there was such a request. The plaintiff has sought to make out that till the 3rd or the 4th of January 1914 the 1st defendant had hopes of getting money from him, but

Sri Krishnayya Rao v. Rajah of Pittapur. Venkata-subba Rao, J.

on or about that date she became decisively aware that no help would be forthcoming and that thereupon the 1st defendant, displeased with his conduct and in order to spite him, began to arrange for an adoption. I am clearly of the opinion that the plaintiff has not made out this case. The evidence of Mr. Krishnaswami Chetty to which I have referred, shows beyond doubt that more than two months before the adoption he was interviewed regarding it by D.W. 1 and D.W. 27. The interview would thus be about the middle of December 1913 and therefore some weeks prior to the 3rd or the 4th of January 1914. Further there is evidence that is uncontradicted, that even a year before the adoption Ramakrishna was approached with a request to give his son. Granting that the 1st defendant did apply to the plaintiff for money, the latter has signally failed in his attempt to show that that incident and the adoption are related to each other as cause and effect.

From these findings it follows as an inevitable conclusion, that the 1st defendant was not influenced in her decision by any indirect, improper, or corrupt motives and that the terms which ended in the arrangement, far from exercising an overriding influence on her mind played no part at all as an inducing factor in bringing about the adoption.

I find it difficult to arrive at any other conclusion on the evidence on the record, which, as I have said, is practically all one way. But the contention of the plaintiff's learned Vakil amounts to asking us to base our finding on speculative reasoning, rejecting the whole body of positive and direct testimony. He asks us to say that it is more probable that the widow's act was selfish and she was actuated by fraudulent motives. I fail to see why we should refuse to act upon the evidence in the case, and in the absence of compelling circumstances, assume without warrant, that the widow was actuated by improper motives.

In considering whether the conduct of the 1st defendant was fraudulent and whether the adoption was made for a corrupt purpose, the observations of the Privy Council in *Bhasba Rabidat Singh* v. *Indar Kunwar*, I.L.R. 16 Cal. 556, will be found very useful. It is unnecessary to state the facts of that case, but I would call special attention to the observations of Lord Macnaughten at page 564.

I may conclude my discussion of this part of the case with a few remarks as to whether the widow had really debts to discharge. The only evidence on the point is that adduced by the defence. The parties took up extreme positions, the plaintiff contending that the 1st defendant had no debts to pay at all, and the defendants, that the debts were wholly those of the 1st defendant. The theory of the plaintiffs, that the brothers of the 1st defendant required the money for redeeming the Oratla estate, has

Sri Krishnayya Rao v. Rajah of Kottapur.

Venkatasubba Rao, J.

completely broken down. It was suggested that the money was wanted for that purpose, but this suggestion had to be abandoned, as it was clear beyond doubt. that the money when raised was really not utilised for redeeming that estate. As there is repeated reference to Oratla in the evidence, I may with advantage state a few facts regarding it. Sitaramayya, the 1st defendant's brother, purchased Oratla subject to a mortgage. The Rani of Tuni the mortgagee filed a suit in 1910 for recovery of about 7 lakhs of rupees by sale of Oratla. Sitaramayya pleaded that only a sum of about rupees twenty thousand was due, but was apparently prepared to pay about 2 lakhs of rupees and redeem the property. The Court ultimately declared that the amount due was about 5 lakhs. The suit was actually disposed of in December 1915. The upshot was that Oratla was not redeemed and no money was required for payment in that connection. These facts are not denied and it follows from them that the money borrowed from the Raja of Venkatagiri, to whatever use it was put, was certainly not utilised for redeeming Oratla. At the time the money was raised, the mortgage suit was still pending and there is no evidence that there was any attempt to compromise it by payment of either 2½ lakhs or any part of it. The tangible case put forward by the plaintiff having been thus disproved we are left to infer the truth from the only evidence on the record, that adduced by the defendants. The 1st defendant and her witnesses say that it was used for paying off her debts. The fact seems to be, that the widow was freely spending moneys on behalf of her brothers and that as she was prepared to support them and treat them with great liberality, when moneys were borrowed it was her credit that was usually pledged, whether the party borrowing was herself or one of her brothers. The parties themselves making no distinction between the debts of the one and the debts of the other, it is impossible for the Court to apportion the amounts. How loose and inexact the ideas of the parties were on this point, will appear from the following extract from the evidence of Sitaramayya:—

"That loan (from Venkatagiri) was borrowed for the purpose of discharging the 1st defendant's debts alone . . .

The debts which I mentioned as 1st defendant's debts are partly borrowed in her own name and partly in our names. . . . Whenever I borrowed moneys for her I always obtained her previous permission to do so."

This is said in examination-in-chief. When pressed regarding details in cross-examination, he admitted that several debts of his were paid off out of the money raised, and significantly added:

"The 1st defendant dischaged most of the above debts. Most of the above documents were executed by me or my elder brother or by Venkiah: whoever happened to be present . . They were executed for her (1st defendant's) purpose and she would pay us not only from these borrowed

Sri Krishnayya Rao v. Raja of Pittapur. Venkatasubba Rao, J.

monies and also other funds of hers. She would give us as much of the borrowed monies as she liked."

The witness explains that as the 1st defendant was a woman, creditors insisted upon the signature of himself or his brothers. It is unnecessary to give further extracts from the evidence on this point. The defence thus makes no secret of the fact that some debts that were paid off were those incurred in the names of Sitaramayya and his brothers; but it relies upon the fact that the widow chose to treat the debts as her own debts by her uniform conduct in this respect. The mortgage in favour of Venkatagiri was executed by the defendant as well as her brother, but from this fact it is difficult to make any inference. My conclusion therefore is, that during a long period prior to the adoption the 1st defendant came to regard her debts or those of her brothers' indiscriminately as binding upon herself and they were paid off from the moneys raised under Ex. 18 from the Raja of Venkatagiri.

III. Was Ramakrishna physically and mentally fit to take part in the ceremony of adoption?

That Ramakrishna's state of mind or body did not prevent him from taking part in the adoption, there can be no doubt. D.W. 1 says that the ceremony took about half an hour, that Ramakrishna took the hands of the boy and placed them in the hands of the 1st defendant and that he was capable of performing and understanding the effect of that act. This evidence receives support from a mass of other evidence including that of very respectable and disinterested witnesses. Mr. Krishnaswami Chetti, D.W. 9, for instance, says that the ceremony was attended by several influential men including himself. He gives very detailed evidence to show that Ramakrishna took an intelligent part in the adoption. Narasinga Rao, P.W. 113 (who by the way, does not say he was present at the adoption) seriously suggests that Ramakrishna was unfit. The learned District Judge has recorded a finding against the plaintiff and although the Lower Court's time was much taken up with this point, in this Court the plaintiff's vakil has addressed to us only a lukewarm argument. The plaintiff sought to make out that Ramakrishna was practically dying that day and in this attempt he has completely failed. As a matter of fact, he lived for several weeks after the adoption. I must therefore hold that Ramakrishna was both physically and mentally fit to take part in the ceremony of adoption and that the ground urged by the plaintiff in this respect fails.

IV. The consent of the Sapindas.—I have now to consider the very important question of the consent of kinsmen to the adoption. The nearest sapindas of the first defendant were the plaintiff and Ramakrishna, kinsmen of equal degree, both being sons of her husband's brother, the late Raja of Pittapur. Ramakrishna assented

Sri Krishnayya Rao v. Rajah of Pittapur

Venkatasubba Rao, J.

to the adoption, whereas the plaintiff withheld his consent. The fact that the nearest kinsmen are two in number precludes the possibility of there being a majority either for or against the adoption.

It is contended by Mr. Ramachandra Aiyar for the defence, that in such a case the consent of one sapinda validates the adoption. In any event, he urges that the dissent of the plaintiff may be ignored, as he was influenced by selfish, corrupt and improper motives. He raises a further contention, namely, that when a man has sons, the latter equally with their father fall in the group of the nearest sapindas. Applying this rule to the facts of the present case, it is alleged that a majority of the nearest sapindas consented to the adoption as Gangadhara Rama Rao and Rajagopal the sons of Ramakrishna are among those who gave assent. Mr. Alladi Krishnaswami Aiyar for the plaintiff answers these arguments by contending, first, that when there is an even number of sapindas who are equally divided in opinion, there can be no valid consent and in consequence no valid adoption. He secondly urges that in any event if the dissenting sapinda is not actuated by corrupt or malicious motives, his dissent becomes material and maintains that the refusal to consent on the plaintiff's part was not due to such motives.

It is thirdly contended by the plaintiff that the consent of the natural father, though he be one of the nearest sapindas, does not count and that accordingly Ramakrishna's consent must be ignored. The fourth point taken by him is, that the position of Ramakrishna who is an adopted son is in this respect inferior to that of the plaintiff who is an *aurasa* son. It is fifthly urged that the 1st defendant's application for the consent of the plaintiff was not *bona fide* and therefore bad and it is further argued that, if the application is itself bad, it is needless to go into the question of consent.

I shall now proceed to consider the points of fact as well as of law involved in these various propositions:—

(1) Was Ramakrishna disqualified to give consent by reason of his being the natural father of the adopted boy?

It is now settled law that the consent of the nearest sapindas validates the adoption: There is no authority for the position that the consent of a sapinda may be discounted on the ground that he is the natural father of the boy. It is well known that the adoption of a boy from among the sapindas is generally regarded as a particularly good act. While the adoption of a sapinda's son is favoured, it cannot with reason be argued that the consent of that very sapinda must be ignored. The two positions are somewhat irreconcilable. Further, the rule which enjoins that the sapindas should be consulted, assumes that they are capable of viewing the question impartially putting aside selfish and improper considerations. In one sense, are not the nearest sapindas the very men

Sri Krishnayya Rao v. Rajah of Pittapur. Venkatasubba Rao, J.

who are incapable of forming an honest judgment? If there be no adoption, it is on them that the property of the last male holder in the ordinary course devolves. They help to defeat this valuable right of theirs by consenting to an adoption; but the law proceeds upon the footing that the sapindas can take a dispassionate view of the question and form an honest and intelligent judgment. Thus though it is to the interests of the sapindas generally to refuse, it is assumed that they will consent when to withhold assent will be a breach of duty. Similarly, though it is to the interest of the natural father to consent, it may be assumed that acting honestly he will refuse to consent, if the circumstances make that course of action necessary. As I have said, it is of the very essence of the rule of consent, that the sapindas are presumed to be capable of forming an honest judgment, although in the very nature of things they are interested parties. Further, if the motives are to be taken into account at all, it must be borne in mind that the statement that a father is interesed in consenting to his son's adoption, is but a half truth; for, while by the adoption the son gains, the father undoubtedly loses as by his consent he destroys the possibility of himself succeeding. I cannot therefore accede to the proposition that the boy's natural father is as such, incapable of giving consent.

Having thus cleared the ground, I shall now proceed to consider whether the consent of Ramakrishna may be discounted on any special grounds. I have already discussed the manner in which Râmakrisna approached the question of adoption. The evidence of Mr. Krishnaswamy Chetty on this point I have set forth. Ramakrishna felt that the 1st defendant belonged to a faction opposed to him and did not at first look with favour on the proposal. The Maharaja of Venkatagiri, his brother, whose advice he was wont to treat with great deference, was from the start in favour of the adoption. Ramakrishna was willing to abide by his brother's advice and finally agreed to give away his boy. That he deeply weighed the pros and cons, appears from his conduct. After deliberation, he went up to Mr. Krishnaswamy Chetty and formally informed him that he had made up his mind and was willing and requested him to inform Venkatagiri accordingly. It is very probable, as spoken to by some witnesses, that it was on account of this prejudice of Ramakrishna, that Venkatagiri suggested the alliance to which reference has been made. It was a shrewd and practical suggestion, that if the 2nd defendant married Seetharamayya's daughter, the alliance would produce harmonious relations between the adopted boy and the 1st defendant's relations. The 1st defendant also speaks to this hesitation on the part of Ramakrishna. He did not easily consent (to use her own words) "as I was living in Pittapur and the boy would be in the midst of enemies." She proceeds to say that when she assured him of the boy's safety he agreed. It is noteworthy that even Narasinga Rao has had to refer

to this initial reluctance on the part of Ramakrishna. In this connection, it must not be lost sight of, that when Ramakrishna gave his consent on the 30th of January, the 1st defendant was still at Undoor and there were no terms in contemplation. In discussing the motives of Ramakrishna, this fact becomes very material as it shows that he could not have been influenced by any extraneous considerations. It is unnecessary to pursue this matter further. It is proved beyond doubt that Ramakrishna did not start with a bias in favour of the adoption and that whatever may be the law on the point, he was personally not disqualified to be consulted or to give advice.

Then there is the fact that Ramakrishna had several sons and that by consenting to the adoption of one of them, while he may probably be conferring an advantage on that particular son, his act operates to the detriment of his other sons, as it destroys their reversionery right of succession.

It is well to bear in mind in this connection that when Ramakrishna gave his consent, he was conscious of the fact that he occupied this dual position and framed his reply accordingly. In Ex. 15-A, the letter of consent, he states first that he consents to the adoption and secondly he states that he consents *to his son* being adopted. I therefore reject the plaintiff's contention on this point.

(2) Is the position of an *aurasa* son superior in this respect to that of an adopted son?

For insisting upon the consent of the sapindas *generally*, various reasons have been suggested by the Judicial Committee; but the reason for requiring the consent of *the nearest* among the sapindas is, that it is their reversionary interest that is affected by the adoption. The more recent decisions of the Privy Council have placed this matter beyond doubt, (see *Kesar Singh* v. *Secretary of State*, I.L.R. 49 Mad. 652 at 673 to 677). In regard to lineal succession, the right of an *aurasa* son is undoubtedly greater than that of an adopted son, but in regard to their reversionary right they stand upon an equal footing, as when the succession opens upon the widow's death, they take equally. As the sapinda's right to be consulted depends upon the measure of their proprietary (or quasi-proprietary) right, it stands to reason that in regard to consenting to an adoption, the position of the *aurasa* son and the adopted son must be alike, their rights to property being equal. I cannot therefore accept the contention of the plaintiff's learned vakil on this point.

(3) When a man has sons, do the latter equally with their father fall in the group of the nearest sapindas?

Mr. Ramachandra Aiyar for the defence contends that, although as a general rule the nearer sapinda excludes the more remote, an exception must be made in the case of a father and his sons, the

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkatasubba Rao, J.

term sons including the grandsons. I do not think that on principle this position is sound. If the consent derives its force from a member's position in the family, the father decidedly occupies a place relatively of greater importance than the son and the latter must on that footing yield precedence to the father. If, again, the question has to be decided with reference to rights of property, the father succeeds as reversioner to the exclusion of the son—which is inconsistent with the theory of the father and the son falling alike in the same group. To test the correctness of Mr. Ramachandra Aiyar's position, let us take a concrete case. If A, B and C who are brothers happen to be the nearest sapindas, A having four sons, his branch has, on this theory, five votes as against the one vote of B and the one vote of C, the two latter having no sons. This illustrates the unsoundness of the position as such a result could not have been intended. The learned vakil relies upon certain passages in the judgments of the Judicial Committee, where their Lordships, without having their attention called to this point, and without adverting to it, have casually, while describing a group of sapindas, included in that group, the father as well as the sons. (See *Veerabasavaraju* v. *Bala Surya Prasada Rao,* I.L.R. 41 Mad. 998:45 I.A. 265: *Adusumilli Kristnayya* v. *Adusumilli Lakshmipathi,* I.L.R. 43 Mad. 650: 47 I.A. 99). It is not, in my opinion, right to infer from these passages that their Lordships intended to lay down a rule which runs counter to the principle repeatedly recognised by them. I must therefore reject the contention on this urged by the defence.

(4) Was the plaintiff justified in refusing to consent?

The plaintiff in his reply Ex. EE-11, dated the 11th February 1914, has very fully set forth his reasons for withholding consent. It is a carefully prepared document, drafted under legal advice and the reasons mentioned in it must be closely examined. They are:

(*a*) The 1st defendant's object in making the adoption was to spite the plaintiff as he refused pecuniary help.

I have already discussed this point and shown that there is no substance in this complaint.

(*b*) The plaintiff next refers to the loss that may be caused to him. He admits in his cross-examination that the loss adverted to is the prejudice to his reversionary right. He also admits that the estrangement between himself and the 1st defendant dates from the adoption. That the plaintiff regarded the 1st defendant as his enemy on account of this adoption, there can be no doubt. He says so expressly in his evidence and we have also the fact that, immediately after the adoption, he caused three criminal prosecutions to be filed against the 1st defendant and her brothers, which, however, ended favourably to them. There is not a shadow of justification for suggesting that the motive of the 1st defendant in

adopting, was to cause loss to the plaintiff. The refusal to consent, because the reversionary interest of the sapinda will be prejudiced, can in no circumstances be justified.

Sri Krishnayya Rao
v.
Raja of Pittapur.
—
Venkatasubba Rao, J.

(*c*) The fact that the boy is the son of Ramakrishna, the plaintiff's "long standing enemy" is urged as the next reason.

The plaintiff here betrays that he is actuated by a selfish motive. The result that a sapinda must be consulted, rests on the theory, that he is able to subordinate his own interest and bring to bear a calm and reasoned judgment. His enmity to Ramakrishna is a matter personal to himself and does not affect the widow whose interests he is supposed to be safeguarding. In his evidence, the plaintiff further amplifies this ground of objection. He asserts that he objected to the adoption as the boy belonged to a family which denied his legitimacy. In the first place, no blame in any event attached to the boy; for, he had never denied the plaintiff's status. Further, the 2nd defendant, being the plaintiffs' brothers son was already a member of the plaintiff's family. There is no question of introducing a stranger and the objection is therefore wholly futile. As a fact, the adoption had the effect of removing the 2nd defendant one degree further from the plaintiff. As Mr. Ramachandra Aiyar pointed out in his powerful argument, the plaintiff seemed to say "I am concerned only with my legitimacy and nothing else matters to me." The very idea that the adoption was to be of one, whom he considered to be his enemy was repugnant to him and his mind became clouded and he could no longer be trusted to arrive at a proper decision. The ground urged is thus frivolous and shows that the plaintiff having first made up his mind to oppose the adoption, was seeking reasons to justify his refusal.

(*d*) The plaintiff next complains that the 1st defendant did not not care to personally interview him. This is again a palpably unsound reason. The 1st defendant wrote to the plaintiff on the 2nd of February asking for consent. The wording of the letter is unobjectionable and the plaintiff admits this in his deposition. As no reply was received the 1st defendant sent a reminder on the 7th of February. Was there a duty cast upon the widow to personally approach the plaintiff? There is no doubt that the 1st defendant was aware, as the plaintiff was, that he would treat with disfavour any proposal to adopt. Having regard to the plaintiff's position, the widow might well be reluctant to meet him personally and provoke him to anger. There is nothing to compel a widow to put herself in such a position. On the contrary, if the plaintiff believed that there was any matter that could be cleared up by a personal discussion, it was open to him to suggest an interview to the 1st defendant. This reason is of a piece with the reasons already considered and must be rejected as improper.

Sri Krishnayya Rao v. Raja of Pittapur. —— Venkatasubba Rao, J.

(e) It is next alleged that Ramakrishna's consent was purchased for consideration. That this is an entirely unfounded allegation, the plaintiff has had to admit. This is indicative of the mentality of the plaintiff. In his anxiety to find reasons against the adoption, he went the length of making aspersions against Ramakrishna whose integrity in this connexion has not been impeached. The plaintiff says that he heard that Ramakrishna received a few thousand rupees and gave consent and admits that this information has turned out to be wrong. I am afraid that little credit is due to the plaintiff even for this admission. His case in the plaint was, that Ramakrishna's state of mind prevented him from comprehending anything and that he was practically unconscious during this period. It would militate against that case to suggest that Ramakrishna received a bribe. Finding himself in this awkward position, the plaintiff gave up the charge of bribery and pressed the point that Ramakrishna was unconscious. This reason is thus admittedly unsound.

(f) The next reason alleged by the plaintiff is, that the 1st defendant entered into certain pre-adoption arrangements which had the effect of depriving the adopted son of a portion of the property. As Mr. Ramachandra Aiyar has pointed out, the solicitude of the plaintiff for the 2nd defendant to whose adoption on personal grounds he was opposed, seems somewhat paradoxical. However this may be, I have already discussed and shown that the widow was not influenced by any corrupt or capricious motives. By the 5th of February or so, it was decided that there were to be two arrangements which were afterwards embodied in Exs. 17 and 17-A. As the plaintiff wrote on the 11th there can be no doubt that the arrangements referred to in his letter are these two arrangements. The first thing that the plaintiff did on receiving the widow's application, was to depute men to go about and collect facts regarding the proposed adoption. On the 1st defendant's side, there was no secrecy maintained and the stamp papers were purchased on the 6th of February for the settlement and maintenance deeds. If the desire of the plaintiff was to decide honestly, he might have scrutinized the real nature of these arrangements. He would have been well within his rights to ask the 1st defendant for particulars and insist upon obtaining fuller information. These steps he failed to take, and as things have turned out the Court has had to decide the true character of the transaction, and as I have already said, it cannot be invalidated by reason of these arrangements.

I do not propose to deal in greater detail with the evidence of the plaintiff on this part of the case which I cannot accept as true in certain respects, as, for instance, where he says that he had heard at that time of the loan by Venkatagiri.

(g) A further reason alleged was, that the 1st defendant applied for his consent "merely for the sake of formality" and not with a

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkatasubba Rao, J.

desire to obtain his consent. This allegation was sought to be made good by showing that the adoption was first fixed for the 8th of February, then for the 13th and finally for the 15th. It is asked, if the 1st defendant really sought the mind of the plaintiff, how could the adoption have been fixed for the 8th, before the plaintiff's reply was received? The answer is two-fold. There is nothing to show that the dates were not tentatively fixed, and secondly the dates might be fixed in the expectation that a reply would be received in the meantime. This objection is, in my opinion, also bad.

(*h*) The next reason refers to certain agreement between the late Raja and the 1st defendant's husband. It is alleged that they had the effect of forbidding an adoption. This requires separate treatment and all I need say at present is, that in my opinion this objection is also bad.

These are the reasons mentioned in Ex. EE-11 and urged at the trial. I have come to the conclusion that the plaintiff approached the question with a biassed mind and rendered himself incapable to be a proper judge of the transaction. I have come to the further conclusion that he was influenced by improper and selfish motives in refusing consent, and that the reasons on which he seeks to justify his refusal are utterly unsound.

(5) Is the application to the plaintiff for consent itself bad?

In her letters asking for consent, the 1st defendant treated the plaintiff with deference. Indeed, the plaintiff himself found nothing objectionable either in their tone or their contents. This is expressly admitted by him in his deposition, but at the trial it was discovered by his legal advisers that the plaintiff was not described in the letters as her sapinda—a circumstance which is quite immaterial. Then it is argued by Mr. S. Srinivasa Aiyangar, for the plaintiff, that in this suit the 1st defendant denied the plaintiff's status as a sapinda. This again seems to me to have no bearing on the question. When the plaintiff attacked the adoption made by the 1st defendant, she was justified in protecting herself by urging every ground against him and the question of his parentage was, at any rate, not free from doubt, the Court on the previous occasion having given its decision against him. The denial of the plaintiff's status having thus been made one of the main planks in the defence, it was too much to expect the 1st defendant and her witnesses to admit in cross-examination, that the plaintiff was a sapinda and when his consent was sought for, he was regarded as such. No weight can therefore be attached to the statements made in this respect at the trial. Moreover, I am of the opinion that, when it is shown that the widow has sought the advice of her kinsmen, the Court must not embark upon an enquiry as to what the motives of the widow are in seeking consent. A duty is cast upon the

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkata subba Rao, J.

widow to apply for consent and, when she performs that duty, her act cannot be questioned on the ground that her motives were bad. The Privy Council has held that, even when it is known that a sapinda if asked will refuse, his consent must be sought. This by analogy shows that it is immaterial to enquire whether the widow intended to abide by the advice, when given, or not. In any event, on the facts, I am satisfied that there is no force in the argument that the 1st defendant treated the application to the plaintiff as a mere formality.

(6) Is the consent sufficient?

I have now reached that stage in the discussion, when I may conveniently deal with the question of sufficiency of the consent, measured by quantity. The plaintiff as well as Ramakrishna are, as I have said, sapindas of the same degree, both being the sons of the late Raja, the brother-in-law (husband's brother) of the adopting widow. Ramakrishna has given his consent, whereas the plaintiff has not. The question is, is this consent sufficient? The foundation of the doctrine of consent is, that it affords evidence "that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive." (See Ramnad case, *The Collector of Madura* v. *Moottoo Ramalinga Sathupathi* and *Anandai* v. *Ranee Parvata Vardani Nachear* and *Ranee Parvata Vardani Nachear* v. *Anandai*, 12 M.I.A. 397). When consent is efficacious to validate an adoption, the Court has no direct concern with the motives of the widow. If the Court finds the consent valid, it leaves alone the question of the widow's motives. It is for the kinsmen who are called on to grant consent, to examine the motives and where it is found that effective consent has been granted, the Court will treat that as the decision of a domestic tribunal and will not trouble to canvass the propriety of the consent. Now in regard to the sufficiency of the consent, the decisions of the Privy Council have laid down certain tests by which that point has to be determined. The case has been argued on the footing that the plaintiff and Ramakrishna are the separated kinsmen of the widow's deceased husband. It is now settled law that the authorization requisite to the validity of an adoption, is that of the nearest sapindas. It has also been held that it is the duty of the widow to consult every member of this body, and if the widow fails to consult one of them, she cannot justify her omission by showing that she did not consult because she knew that if consulted he would refuse. In this case, the nearest sapindas were two in number and she consulted them both. The Privy Council have also said that if a majority of the kinsmen assent and one refuses, his objection may be discounted. (*Veerabasavaraju* v. *Balasurya Prasada Rao*, 45 I.A. 265: I.L.R. 41 Mad. 998). The rule must on principle be extended to where the minority con-

sists of more than one (*Kesar Singh* v. *The Secretary of State for India,* I.L.R. 49 Mad. 652 at 675). The word 'majority' in this passage has been explained by the Privy Council as being a "substantial majority." (*Adusumilli Kristnayya* v. *Adusumilli Lakshmipathi,* 47 I.A. 99: I.L.R. 43, Mad. 650). Now if the substantial majority refuse, the objection of the minority may be disregarded. This I take to be the effect of the decisions of the Privy Council. In such a case—as in the case where the kinsmen unanimously assent—the sapinda's consent is irrebuttable proof of the propriety of the adoption. This rule of course is subject to a well known exception that the consent should not have been purchased. (*Ramnad case,* 12 M.I.A. and *Karunabdhi Ganesa Ratnamaiyar* v. *Gopala Ratnamaiyar,* 7 I.A. 173: I.L.R. 2 Mad. 270). It is the kinsmen that are adversely affected by the adoption and when they are satisfied and accord consent, the Court does not take upon itself to enquire into the motive for the adoption or its purpose or object. The decisions of the Privy Council also establish, that if a near sapinda is incapable of forming a judgment, as in the case of a minor or a lunatic, his consent is not necessary. Similarly when it is proved that he is actuated by corrupt or malicious motives his dissent may be disregarded. Their Lordships also observe that the consent required is that of a majority of those kinsmen "who are capable of forming an intelligent and honest judgment." I have said that if a substantial majority consent, the dissent of the minority may be ignored. The question then arises, what is to be the position where the assent is that of a *bare* (as distinguished from *substantial*) majority? Then again, if the number of the nearest sapindas is even, what is to happen if they are equally divided? The Privy Council has so far not had any occasion to make a pronouncement on these matters. But from the prniciples laid down by that tribunal and from the reason of the thing, it seems to follow that the Court will in such cases be called on to decide the propriety or the *bona fides* of the dissent. The assenting kinsmen are not required to justify their assent; for the adoption is a meritorious act and it is presumed that the assent was properly given. It must be borne in mind that I am now dealing with cases where either half the number of the kinsmen or a bare majority of them have granted consent. If it is proved in such cases that the dissenting kinsmen were actuated by corrupt or malicious motives their dissent must be disregarded; but the difference between there being an unanimous vote or a vote of a substantial majority and the cases under consideration, is, that in the former the dissent is summarily ignored without the Court going into the question of the propriety or otherwise of the dissent; whereas in the second set of cases the Court has to find before discarding the dissent, that it was actuated

Sri Krishnayya Rao v. Rajah of Pittapur — Venkatasubba Rao, J.

by corrupt or malicious motives. Although, here again the Court has no concern with the motives of the widow, they indirectly come into notice when it has to judge of the *bona fides* of the dissent—for, as I have pointed out, it is within the province of the kinsmen to go into the widow's motives in deciding whether they shall give or withhold consent.

In the present case, the sapindas being equally divided in opinion, on the principle I have stated, it becomes necessary to examine whether the dissenting sapinda was actuated by corrupt or malicious motives. In discussing the evidence I have shown that the plaintiff refused from indirect motives and on personal grounds.

In *Parasara Bhattar* v. *Rangaraja Bhattar*, I.L.R. 2 Mad. 202. where there were two sapindas standing in the same degree of relationship, one of whom assented and the other refused, Turner and Innes, JJ., upheld the adoption on the ground that the refusal was due to improper motives. This is a very important case, because on my finding it is on all fours with the present. The dissenting sapinda in that case is said to have "refused" from interested or improper motives or without a fair exercise of discretion.

In this connection I may also refer to *Subrahmanyam* v. *Venkamma*, I.L.R. 26 Mad. 627, (affirmed by the Privy Council in *Venkamma* v. *Subrahmaniam*, 34 I.A. 22). There were two sapindas of equal degree, one of whom gave assent to the adoption and the other was not asked. Benson and Bhashyam Aiyangar, JJ., held the adoption invalid and made the following observations which are relevant to the present purpose:—

"If she had applied to him for his assent and he had withheld the same, with or without assigning reasons and she had nevertheless made the adoption relying on the assent of the 3rd defendant alone, we should have been in a position to decide whether the plaintiff had withheld his assent properly or improperly and capriciously."

This passage implies that if the sapinda had been asked and refused, the Court would have considered his reasons and if they were improper ignored his dissent. It has been contended by Mr. Krishnaswami Aiyar that the refusal must be due to *corrupt* or *malicious* motives (see *Krishnayya* v. *Lakshmipathi*, 47 I.A. 99 at 102). The Privy Council in using those words did not mean to exclude motives such as those described in I.L.R. 2 Mad. 202. In *Nagarampalli Kamesam* v. *Nagarampalli Batchamma*, (1914) M.W.N. 620, Wallis and Sadasiva Aiyar, JJ., held that the refusal was bad because it was *unreasonable*. In *Venkatapathi* v. *Punnamma*, (1915) M.W.N. 236, it was held by Wallis, C.J., and Hannay, J., that where a sapinda refused from grounds personal to himself the refusal could be ignored. They observed that a

Sri Krishnayya Rao v. Rajah of Pittapur. —— Venkatasubba Rao, J.

reversioner "must act with a deliberate consideration of what is for the benefit of the family." In *Venkatarama Raju* v. *Papamma*, I.L.R. 39 Mad. 77, Sankaran Nair and Spencer, JJ., held that a sapinda should have due regard "for the benefit of the family especially that part of it which the widow represents." Judged by these various tests, the plaintiff's refusal was bad and must be discarded.

In the view I have taken, it is unnecessary to discuss the effect of the consent of the remoter kinsmen obtained by the 1st defendant.

V. Undertaking not to adopt and prohibition to adopt.

Mr. Alladi Krishnaswami Ayyar has raised the contention that the 1st defendant is bound by the covenant on the part of her husband contained in Exs. O and O (1), not to make an adoption, but, beyond merely raising the point, has not supported it by any argument. His contention was overruled by the Lower Court and, as the learned vakil has not argued the point, I do not propose to discuss it and I must hold that this objection fails.

It is next contended that in any event, from the covenant, it may be implied that Venkata Rao prohibited his widow from adopting. Whether the husband prohibited the adoption, is a question of fact. When the prohibition is not express, it must be shown by clear and unequivocal evidence, that the conduct of the husband leads to an irresistible inference that he desired his widow not to make an adoption. If the facts are consistent with the opposite hypothesis, the Court will be very slow to infer that the husband forbade the adoption, an act necessary to the salvation of his own soul. In *Malgauda Paragauda* v. *Babaji Dattu*, I.L.R. 37 Bom. 107, a prohibition was inferred from clear dispositions made in regard to property, dispositions inconsistent with an intention that an adoption should be made. The learned Judges observed:

> "As it stands, the will makes a complete disposition of all the property in favour of the daughters. There is no property left upon which an adoption can take effect * * * Not only was there a complete bequest of the whole estate to the daughters, but the widow was in terms prohibited from disposing of the property to any one except the daughters."

In this case, there is no evidence that Venkata Rao intended not to make an adoption notwithstanding his undertaking, much less, can an intention be reasonably imputed to him to prohibit an adoption by his widow subsequent to his death. It is worthy of note that the late Raja, the father of the plaintiff, did not consider himself bound by his promise not to adopt (for the undertaking is mutual) and that he was the first to infringe this covenant, for he adopted Ramakrishna long before the 1st defendant made the adoption in question. In my opinion this ground also fails.

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkatasubba Rao, J.

It is unnecessary to deal separately with the arguments of the District Judge. I think I have sufficiently indicated my reasons for not accepting them. I may observe that the view of the Lower Court is not entitled in this case to that weight which we should generally attach to the opinion of a Court of first instance, for some of the most important witnesses were examined on commission (D.W. 9, Krishnaswami Chetty and P.W. 113, Narasinga Rao) and even the 1st defendant whose evidence was taken by the Judge, was behind a purdah when she was examined. The Lower Court did not thus have an opportunity of seeing the witnesses or noting their demeanour. I therefore hold in regard to the issue relating to the adoption, that the plaintiff fails. This would be sufficient to dispose of the appeal as on this finding the appeal must be allowed, but I shall consider also the other issue in the case as it has been fully argued before us. That issue raises the question of the plaintiff's parentage. As I have said both his paternal and maternal origin has been disputed and the points to be decided therefore are, whether the plaintiff was begotten by the late Raja and whether Mangayamma, his alleged mother, gave birth to him.

On behalf of the defendants an application was made to admit evidence of witnesses who were examined in the previous suit. At the conclusion of the arguments on that point we gave a ruling that that evidence was inadmissible and intimated that we would state reasons in the final judgment in the case. The following order, I then prepared but did not read in Court and is now embodied in this judgment:—

Order on C.M.P. No. 554 of 1921 (to admit documents) in Appeal No. 62 of 1921.

The question raised is in regard to the admissibility of certain evidence under section 33 of the Evidence Act. The facts so far as they have a bearing on the present application, may be briefly set forth. Before this suit, there was an earlier action and the defendants ask that certain depositions of witnesses in that suit, should be received as evidence in the present suit. Gangadhara Rama Rao, the late Raja of Pittapur, adopted Ramakrishna in 1873, and died in 1890 leaving a will. In 1885 a son was alleged to have born to him who is the present Raja of Pittapur. After the late Raja's death, Ramakrishna instituted the previous suit, O.S. No. 6 of 1891, against the present Raja and the Court of Wards claiming possession of the properties of the late Raja, which after his death, had been taken possession of by the Court of Wards. The present Raja relied upon his being the son of the late Raja and also upon a will made in his favour. The case ultimately went up to the Privy Council and it was decided that the present Raja took the properties under the will in question and the other point regarding his status was left undecided.

Sri Krishnayya Rao v. Rajah of Pittapur. —— Venkatasubba Rao, J.

Now let us turn to the facts of the present case. The late Raja had a younger brother named Venkata Rao to whom the former granted the Gollaprolu Estate out of the Pittapur zamindari, for his maintenance subject to terms with which we are not now concerned. Venkata Rao died in 1871 leaving the 1st defendant his widow surviving him. In 1914 the 1st defendant adopted the 2nd defendant, the natural son of Ramakrishna, and the present Raja has filed this suit for the setting aside of the 2nd defendant's adoption claiming to be the presumptive reversionary heir of Venkata Rao.

The plaintiff's title depends upon his being the *aurasa* son of the late Raja of Pittapur and his status is again questioned in this suit. The plaintiff is a common party to both the actions, but to the first suit Ramakrishna was a party and the 2nd defendant was not. In the present suit Ramakrishna is not a party. In regard to the status of the plaintiff, several witnesses who were examined in the earlier litigation are now dead and the defendants seek to put in, the depositions in the first suit of those witnesses, as evidence under section 33, in the present suit. The learned Subordinate Judge has held that they cannot be treated as evidence in this case and the correctness of this order is impeached by the defendants.

Section 33 says that evidence given by a witness in a judicial proceeding, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found or is incapable of giving evidence or is kept out of the way by the adverse party or when his presence cannot be obtained without unreasonable delay or expense. Then the section proceeds to say when such evidence is admissible. The conditions are stated in the three provisos to the section:—

(1) Provided that the proceeding was between the same parties or their representatives in interest;

(2) Provided that the adverse party in the first proceeding had the right and opportunity to cross-examine, and

(3) Provided that the questions in issue were substantially the same in the first as in the second proceedings.

The wording of the first proviso has given rise to some difficulty: What does the expression 'representatives in interest' mean? A person who derives his title through, or claims under another. is the representative in interest of that other. For example, *B*, the purchaser of an estate from *A*, is *A's* representative in interest, but *A* is not the representative of *B*. Similarly a son who claims a sum of money from his father is the latter's representative and in respect of that sum the father is not the representative of his son.

Sri Krishnayya Rao v. Rajah of Pittapur.

Venkatasubba Rao, J.

This is the sense in which the words "representative in interest" are invariably used, and it is this very sense these words are used in an earlier section, *section 21 of the Evidence Act* itself. Under that section, admissions may be proved as against the person who makes them or his representative in interest. The latter portion means that *the successor* is bound by the statements of his *predecessor in interest*. Under section 33, the question therefore resolves itself into this, namely, is the party in the second proceeding the "representative in interest" of the party in the first? In other words, was the party in the first the predecessor in interest of the party in the second? In the proviso in question, the two proceedings are not separately mentioned and the difficulty is due to this circumstance and also to some extent to the use of the word "was" instead of the word "is." Although the proviso might have been more explicitly worded, there can be no reasonable doubt about its meaning. The English rule is succinctly stated thus in *Taylor on Evidence* :—

"Consequently, the evidence taken on the first trial is admissible on a second trial if, although the two trials be not between the same parties, the second trial is between persons who legally represent the former parties, or are their privies in estate" (11th edition, section 467). The second trial must therefore be between "persons who legally represent the former parties or are their privies in estate"—in the language of the Indian Law, between persons who are "representatives in interest" of the former parties. In 1894, 2 Q.B., 804 (C.A.) *Printing Telegraph and Construction Company of the Agence Havas, Ltd.* v. *Drucker*, A.L., SMITH, L.J., cites the following observations of Lord COTTENHAM in *Humphreys* v. *Pensam* (1 *My. and Cr.*, 580) :

"Depositions can only be read for or against those who are parties or privies to the suit in which the depositions were taken."

The question to be asked is :—are the parties to the second suit "privies to the suit in which the depositions were taken," that is, the first suit?

The rule that the testimony given in respect of a fact in a suit is admissible to prove the same point in a later action between the same parties or their privies has been extended to cases where the interests of the parties in the second action were represented in the earlier one to which they were not parties, as for instance, in the case of legatees or tenants in common. (*See* the judgment of KAY, L.J., in (1894 2 Q.B., 801 already cited). In this passage, the word *"represented"* must be distinguished from the expression *"representative in interest."* The party in the earlier proceeding "represented" the interests of the party in the subsequent proceeding. In other words, the party in the second proceeding

Sri Krishnayya Rao v. Rajah of Pittapur. —— Venkatasubba Rao, J.

is a "representative in interest" of the party in the first proceeding. It makes very little difference how the point is put; but to say that the party in the first proceeding is the representative in interest of the party in the second proceeding, is to put the point upside down. In regard to the extension of the rule referred to by KAY, L.J., it may be pointed out that it is analogous to the rule contained in *explanation 6 to section 11 of the Civil Procedure Code*. That section which deals with *res judicata* says in explanation 6, that where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, *all persons interested in such right shall be deemed to claim under the person so litigating*. Under this explanation, the parties to the second proceeding are taken as the representatives in interest of the parties in the first suit. As already observed, this is tantamount to saying that the parties in the earlier suit "represented" the interests of the parties in the second suit. *Llanover* v. *Homfray* (1881) 19 Ch. D. 224, illustrates the application of this extended rule. In the first action some customary tenants of a Manor filed their Bill on behalf of themselves and all other customary tenants to establish their right to work minerals under their tenements. A second suit of the same nature was filed by customary tenants who did not derive title under any of the plaintiffs in the first suit. It was held by the Court of Appeal that the evidence taken in the former suit was admissible on behalf of the plaintiffs in the later suit, the ground being that there was sufficient privity between the plaintiffs in the first and second actions to make the evidence admissible. The cases cited by Mr. Venkataramana Rao, where a Hindu widow was held to have represented the interests of the reversioners (see *Risal Singh* v. *Balwant Singh,* 40 All. 593, P.C., and *Vaithialinga Mudaliar* v. *Srirangathanni,* 48 Mad., 883, P.C., are analogous to those to which the rule has been extended as observed by Kay, L.J., or again to those falling within explanation 6 to section 11. The same remark applies also to the other set of cases cited by the learned vakil (of which *Chiruvolu Punnamma* v. *Chiruvolu Perrasu,* 29 Mad., 390, F.B., may be taken as an example) where presumptive reversioners were held to represent in suits the interests of the whole body of reversioners including those that are more remote.

Is the present 2nd defendant the representative in interest of Ramakrishna? That is the question to be decided. To determine this, we must examine the title to which the previous litigation related. Without having regard to the nature of the action, it is impossible to say whether a certain person is another's "representative in interest," for, that very expression connotes and implies that the representation must be with reference to a particular title. It is a well known legal term and one cannot conceive of a representative in interest in the abstract. Let us then look at the

Sri Krishnayya Rao v. Rajah of Pittapur. Venkatasubba Rao, J.

scope of the previous suit. On the death of Gangadhara Rama Rao, the late Rajah of Pittapur, Ramakrishna claimed the zamindari of Pittapur on the ground that the plaintiff was not the late Rajah's *aurasa* son but that he was himself the Rajah's adopted son. Ramakrishna was obviously litigating a title in respect of Pittapur. Can it be said that he was litigating also a title in respect of Gollaprolu? It is necessary to determine what the title is that he was then litigating, for upon that depends the question as to who his "representatives in interest" are, for the present purpose. That those that may claim Pittapur on the title then in question are his representatives in interest, admits of no doubt. We are not now concerned, however, with the title to the Pittapur zamindari, but Mr. Venkataramana Rao, in his able argument contends that the title then under dispute must constructively be taken as one relating not only to Pittapur but also to Gollaprolu, as the plaintiff's right to both the estates depended upon his being the son of the late Rajah. If this argument were pushed to its logical extreme, what would be the result? Let us suppose that at the time of the previous suit, there were half a dozen widows like the 1st defendant each in possession of some property, to which the Zamindar of Pittapur was the reversionary heir. It would follow from this contention as a necessary and logical consequence, that Ramakrishna must be constructively deemed to have been litigating, in addition to the actual title then in controversy, also titles in the capacity of a possible reversionary heir, in regard to these various properties. In this view, the several distinct groups of reversioners interested in the various items of property, would be the "representatives in interest" of Ramakrishna. That is to say, if the reversion fell in and there was litigation, any reversioner falling in any of these groups would, accordig to this contention, be a representative of Ramakrishna. This illustration shows the limit to which Mr. Venkataramana Rao's argument can be pushed. The rule in section 33 applies mutually; if these various reversioners can invoke its aid, the plaintiff can also appeal to it in proceedings between himself and them. It is unlikely that these consequences were intended. The contention that Ramakrishna was contesting a title in regard to Gollaprolu thus fails.

Much argument was directed to the point whether in regard to the Pittapur estate Ramakrishna represented the 2nd defendant. It was contended by the appellant's learned vakil that the late Raja Gangadhara Rama Rao and Venkata Rao, the 1st defendant's husband, were undivided *quoad* Pittapur and that therefore Ramakrishna was in a position to, and did represent the 2nd defendant whether his adoption to Venkata Rao is or is not upheld. It was further contended that should it be held that the brothers (the late Rajah and Venkata Rao) were divided *quoad* Pittapur and that the 2nd defendant was validly adopted, even then Ramakrishna re-

presented all the possible heirs in the line of succession to the zamindari of Pittapur including the 2nd defendant. The points of fact as well as of law involved in these propositions were controverted by Mr. S. Srinivasa Aiyangar for the respondents. As the title to which we must have regard is the one relating to Gollaprolu and not to Pittapur, it is unnecessary to consider either the contentions set forth above or the cases on Impartible Estates cited at the bar.

The depositions in the previous suit were rightly rejected and the order of the lower court on this point must be confirmed.

I shall now proceed to consider the second issue. In 1861, the late Raja who was then about seventeen years old married Mangayamma who was slightly younger than himself. He married a second wife in 1865 and a third wife, Subbayamma (known as Nuzvid Rani), in 1871. In 1873, he adopted Ramakrishna, a son of the late Raja of Venkatagiri, and I may in passing note that he was only 29 years old when he made this adoption. There seems to have been some misunderstanding in 1876 between the Raja and Mangayamma, who, in consequence, was permitted to go to her parents' house at Tiruvur. The Raja married in 1879 a fourth wife and either owing to this or some other fact Mangayamma returned to Pittapur in October 1880. Then the next event is one of great importance and it happened in April 1881. A ceremony known as *Seemantham* (generally performed when a lady is pregnant) was celebrated in that month by the Raja at Samalkot and this of course was a public announcement that Mangayamma was pregnant. After the *Seemantham,* she left again for Tiruvur. It is common ground that nothing came of this pregnancy, but the incidents that happened at Tiruvur have some bearing upon the issue to be decided. For the plaintiff it is alleged that Mangayamma's pregnancy was what is known as pseudocyesis or spurious pregnancy, which assumes that she sincerely believed herself to be pregnant. Though it was suggested for the defence that it was not a case of spurious pregnancy but only simulated pregnancy, it must be said that this is, at best, a theory, and is not supported by evidence. Mangayamma is alleged to have been in this condition for about three years. It is stated by some of the plaintiff's witnesses that she had labour pains at regular intervals at the end of 9, 18, 27 and 36 months. It is not disputed that this is a phenomenon unknown to medical science, and whatever may be the truth regarding this alleged pregnancy, this part of the story must be rejected. So far as the Raja was concerned, from the reports that he heard, he seems to have believed that his wife was pregnant and would bring forth a child. In January 1881 he writes to Mr. Grant that his wife's pregnancy had reached the fourth month and in July 1881 that the pregnancy was then nine months old. He continues to write in the same strain. In July, he repeatedly says that the childbirth is expected in a few weeks, and in August that

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkatasubba Rao, J.

it is imminent. Strangely enough, in October, he says that the confinement is likely to take place in a month and we find again that, still later, that is, in November, he informs Mr. Grant that his wife has not yet been delivered of a child. What is still more remarkable is, he writes as late as the 5th February 1883 to Mr. Wedderburn, telling him that he has received news that his wife was in labour pains. The defence strongly contends that Mangayamma imposed upon her husband and got him to believe that she was really pregnant. It is said that her object in so doing was to pave the way for successfully introducing a spurious child. On the evidence, I must come to the conclusion that Mangayamma's pregnancy was spurious pregnancy although I am not prepared to believe that that condition lasted for 36 months and that there were labour pains at regular intervals. In this connection I must notice that it was a part of the defendant's case that Mangayamma made attempts to introduce a false child during this period of her stay at Tiruvur. There was not sufficient evidence at this trial to make out this plea and I must therefore find against it.

I have now so far narrated the events that happened at Tiruvur. Mangayamma left that place in August 1884 and, after a short sojourn at Rajahmundry, came to Pittapur in November of the same year. It is difficult to say why she returned to her husband's place. But one reason suggested is, that the late Raja married successively in May and June 1884 three wives (who are known as Chitrada Rani, Veeravaram Rani and Bobbili Rani) and that Mangayamma became afraid that if she did not return, she would lose all hold on her husband. However this may be, the fact remains that she did return to Pittapur and live under the same roof as her husband. On the 5th of October 1885, at about 12 in the night it was announced that a son was born to Mangayamma, and the plaintiff is said to be that son. He was immediately recognized as his son by the late Raja who put him forward as such, in his letters and telegrams, and who by his uniform conduct till his death in 1890, showed that he entertained no doubt on the point. The question to be decided is, was the plaintiff born to Mangayamma as alleged by him? Before referring to the oral evidence in the case, I think it is very necessary to deal in some detail with the circumstances on which the defence relies for suggesting that the plaintiff is not the son of his alleged mother.

1. Mangayamma was forty years old at the time of the plaintiff's birth and is alleged to have conceived after 23 years of sterility. It is argued that this is extremely improbable.

2. Then it is contended that in regard to the spurious pregnancy, the plaintiff's case that it was marked by certain features has been found to be false and it is suggested that the fact that the plaintiff has thought fit to embellish that part of the case must

Sri. Krishnayya Rao v. Raja of Pittapur.

Venkatasubba Rao, J.

make the Court slow in accepting the evidence adduced to support that true pregnancy supervened.

3. It is then said that it is very unlikely that when spurious pregnancy occurs at a late period in life, it can be followed by a real pregnancy; this is said to be the next suspicious circumstance.

4. The case that the spurious pregnancy came to a definite end and that the real pregnancy began after Mangayamma's return to Pittapur is said to be a myth.

As I have said, Mangayamma came back to Pittapur in November of 1884 and within 11 months from then she is said to have been confined. The plaintiff in order to probabilize his case that the spurious pregnancy terminated, adduced evidence to show that Mangayamma had menses at Pittapur after her return from Tiruvur and before her alleged pregnancy. I have not a shadow of doubt that this evidence is false and it has been rightly discredited by the Lower Court, (para. 21 of the Lower Court's judgment). In this case, where the plaintiff has been able to point to entries in account books to show when Mangayamma had periods, it is significant that he has failed to make out by relying upon similar entries, that the spurious pregnancy definitely came to an end, a fact which if established would have rendered his case of later pregnancy probable. Mr. Ramachandra Aiyar has strongly commented upon this suspicious circumstance and no answer has been suggested.

5. The plaintiff has adduced a mass of evidence but not a single witness has been examined who speaks to his having been present at his alleged birth. This absence of direct evidence on the point is very remarkable in the circumstance of the case. The late Raja had every reason to expect that if Mangayamma's pregnancy resulted in the birth of a son, the latter's legitimacy would be attacked. When Mangayamma was at Tiruvur, Ramakrishna kept watch on her doings and freely gave out that she was feigning pregnancy with a view to foist a spurious child. In this connection two exhibits become very important, Exs. 60-H and 60-H (1); the former is a letter, dated the 7th of September 1881 written by the late Raja to Mr. Grant; the latter is a memorandum sent as an enclosure to that letter. That memorandum shows that a close watch was set upon Mangayamma at Tiruvur by Ramakrishna and that he was intending to suggest that a spurious child was introduced. The sending of this memorandum to Mr. Grant shows that the Raja became aware of the attempts that were then being made. Thus long before the birth of the plaintiff, Ramakrishna and his men made it quite public that they intended to make the attack which, in fact, has now been made. In spite of this warning, we find that no steps were taken either by the Raja or Mangayamma to place the matter of the plaintiff's birth beyond doubt. At Pittapur, attached to the hospital was a nurse and her services

Sri Krishnayya Rao v. Raja of Pittapur.

Venkatasubba Rao, J.

were not availed of. The ordinary dasis (maid-servants) are said to have officiated as midwives, and a doctor of inferior status (Dharmaraju) is said to have visited her for the first time only after the plaintiff's birth. It is strongly contended that this conduct on the part of the Raja and his wife is only consistent with the hypothesis that there was something to conceal and that in fact the plaintiff was not born to Mangayamma.

I have now narrated the circumstances on which the defence relies and I must say that there is quite an accumulation of suspicious circumstances against the plaintiff. I have given prominence to these features, for, to treat them lightly, as the District Judge has done, is to lose sight of the gravity of the questions which this issue raises; but, in my opinion, a finding cannot be based in a case of this kind on suspicion, however strong it may be.

As regards the argument that Mangayamma was past child-bearing, medical books show that it is unsafe to lay down any hard and fast rule.

In "Legal Medicine" by C. M. Tidy, Part II, 1883, there is the following passage at page 29:—

"Certainly cases of pregnancy up to 50 are not very uncommon and have occurred to most medical men with large practice. Between the ages of 50 and 60 the cases are very uncommon, nevertheless it must be admitted that well-authenticated instances are on record."

Emerson in "Legal Medicine and Toxicology" 1909) says that there are instances of women bearing children up to an advanced age and referring to child bearing age, observes "the limits must not be too arbitrarily drawn."

Montgomery in his book on "Signs of Pregnancy" refers to La Motte who gives an account of two cases which are relevant to the present inquiry. The first related to a woman who lived a life of celibacy up to the age of 48 and then married and conceived and had a favourable labour. The other case was that of a woman who married when she was 51, immediately became pregnant and had a quick delivery. The author says that these facts must make one cautious in pronouncing against pregnancy merely on the ground that the individual has exceeded by some years the period of life when ordinarily conception takes place. The author mentions also two cases that came under his own observation; in one, the lady married when about 24 years of age and had her first child after 19 years of married life: in the other the lady married at the age of 20 and became pregnant for the first time 24 years after marriage.

Again, the argument based on spurious pregnancy is not conclusive. It is no doubt said in medical books that spurious pregnancy is met with in sterile women who are approaching the menopause (see Gynaecology by Eden and Lockyer, page 108; Obstetrics

Sri Krishnayya Rao v. Raja of Pittapur. — Venkatasubba Rao, J.

by Williams, pages 208 and 209). The occurrence of menopause indicates generally that the woman has passed the child-bearing age, but our attention has not been drawn to any passage where it has been said that the above rule relating to spurious pregnancy is an inflexible rule.

It seems to me that it is unsafe to act upon suspicion and I therefore turn to the positive evidence in the case. In my opinion, the most important evidence adduced on the plaintiff's side is that of witnesses who have gone into the box to prove three successive stages in Mangayamma's condition, *first,* that soon after her return to Pittapur she looked like an ordinary woman (meaning thereby not a pregnant woman), *secondly,* that she developed signs of pregnancy such as abdominal enlargement and *thirdly,* after the plaintiff's birth she resumed her normal condition. It is needless to refer in any detail to this evidence as it has been fully adverted to in the judgment of the Lower Court. I have not the slightest doubt that many of these witnesses have not scrupled to tell lies, but the fact that stands out is, that they are all agreed that Mangayamma passed through these three different stages. Many of these witnesses pretend to be able to tell us when and how often they saw the lady, what she spoke, where she was seated and so forth. When witnesses give evidence in such detail regarding events that took place at least thirty years previously, one is not disposed to place absolute confidence in their truthfulness. I cannot, however, on this account reject *in toto* the evidence of this large body of witnesses comprising as it does, men and women of all classes, relations, friends, dependants and servants. Much of this evidence is again open to the attack that it is of witnesses who are dependent upon the Raja, but in the very nature of things it is only such evidence that is available, and on the whole I am not prepared to dissent from the view taken of it by the Lower Court.

As against this evidence the defence has examined witnesses to show that there were no such changes in the external appearance of Mangayamma. Ranganayaki, D.W. 29, a dasi of Subbayamma, who professes to have observed Mangayamma several times says that she never looked like a pregnant woman. She goes further and deposes that she did not, before Mangayamma's confinement, even hear of her pregnancy. Similarly, Chinna Ranganayaki, another dasi of Subbayamma, says that Mangayamma never appeared to be pregnant, not even five or six days previous to the announcement of the plaintiff's birth. She also maintains that she did not even hear of Mangayamma's labour pains on the day in question. This evidence cannot be true, for, if Mangayamma wanted to introduce a spurious child, it would be necessary for her to feign pregnancy as well as pretend that labour had occurred. The defendants ask us to believe that without exhibiting signs of pregnancy, without feigning labour and without warning, Mangayamma all of a sudden,

Sri Krishnayya Rao v. Rajah of Pittapur.

Venkatasubba Rao, J

in the dead of night had the temerity to announce the birth of a child, not doubting that her husband, the inmates of her household, and the public would be taken in by such a palpable falsehood. The defence having put forward this absurd theory has had to shape its evidence accordingly. Closely allied to this theory is another theory, advanced and adhered to at the trial (as appears from the note of the learned Judge) that the late Raja was not a party to the fraud but a victim of it. Mangayamma could not have long kept up the appearance of a pregnant woman without being detected by her husband. It is not suggested that the Raja and she were not on intimate terms and unless he was a party to the fraud, Mangayamma ran the risk every hour of her life, of detection and exposure. Evidence was therefore let in, to the effect that Mangayamma during this period did not exhibit any signs of pregnancy. It has been repeatedly pointed out to us in the course of the arguments that at the previous trial the theory put forward was that the Raja was also a party to the fraud. The case of the defence that the plaintiff is a spurious child was then accepted by the Court. Why this theory was abandoned and an impossible theory suggested, I do not care to speculate. The result remains, that the evidence given to suit this theory is utterly unworthy of credit.

This theory further involves that the Raja was quite unprepared for the event and that he was such a simpleton as to believe that his wife could give birth to a child in the face of the fact that she exhibited no symptoms of pregnancy from the day of her return to Pittapur.

This leads me to consider the evidence of a witness on whom the plaintiff strongly relies, Dharmaraju, P.W. 48. He is said to have entered Mangayamma's room with the Raja very soon after the birth was announced. He is further said to have felt the pulse of Mangayamma and given her some medicine. The plaintiff's case is, that the Raja expecting the confinement asked this man to be in attendance at the Fort. There is some suspicion attaching to this witness's evidence as he has deviated in certain important respects from his evidence at the former trial, and also as he is indebted to the plaintiff, having received liberal gifts from his father and being even on the date of trial in receipt of a large pension from the plaintiff. Here again the defence suffers from its theory. Jaldu Appi, D.W. 35, an important witness for the defendants, admits that as soon as the birth was reported to the Raja he came into the room accompanied by Dharmaraju. Sita, another defence witness, whose evidence at the former trial has been admitted, deposed to the same effect. After stating that the Raja and the Dresser entered the room, she proceeds to say thus—

"The Raja asked the Dresser to feel Mangayamma's pulse. He spoke something in English. Then the Dresser wanted to hold Mangayamma's hand. Mangayamma refused. The Raja

Sri Krishnayya Rao v. Rajah of Pittapur. — Venkatasubba Rao, J.

then said, 'I am here. You need not be afraid. Give your hand.' Then Mangayamma gave her hand and the Dresser felt her pulse." If Mangayamma was practising deception upon her own husband, how did this Dresser happen to be on the spot? Was he an ally of Mangayamma bent on deceiving the Raja? If so, how did it happen that the Raja brought him into the room without even questioning him as to how he happened to be present at the Fort? The defence has not suggested that Dharmaraju was Mangayamma's creature. The witness thus was not the confidant of Mangayamma; He was not the Raja's tool as the latter was admittedly not a party to the fraud; his presence in the room is nevertheless admitted. Having regard to these facts, his evidence cannot be disbelieved.

The defence has adduced positive evidence in regard to the introduction of a spurious child. The witnesses examined on this point are Jaldu Appi and Sita to whom I have already referred. According to them, Mangayamma pledged them to secrecy and directed them to bring into her room a child which one Kanakayya was to keep ready in his arms outside the gate. Another servant by name Bodidi brought into the room a pot containing some after-birth and it was made to appear that it related to the child in question. I am not prepared to say that this account is on the face of it improbable. If Mangayamma intended to perpetrate a fraud of this kind she could only employ women of this description, but when their evidence has to be tested, it must be borne in mind that on their own showing they were accomplices and were prepared to take part in a grave offence. It would be very unsafe to act upon their evidence which does not fit in with the other part of the case as presented by the defence and which receives no corroboration from the surrounding circumstances.

There is other evidence adduced by the plaintiff which, in my opinion, is not of much value. There is, for instance, the conduct of Mangayamma after the event. If she was really guilty of the fraud, she would make her conduct suit her act. Thus, evidence of her conduct though undoubtedly relevant can be of little evidentiary value. Similarly, though it may reasonably be presumed that the Raja could not have been cheated, if, as a matter of fact, he was really imposed on, his subsequent conduct would signify little. I do not therefore propose to examine the rest of the evidence adduced on behalf of the plaintiff; more especially, because it has been fully discussed in the judgment of the lower court.

I have now disposed of the question whether Mangayamma is the mother of the plaintiff. In regard to the plaintiff's paternity, Mr. Ramachandra Aiyar has frankly conceded that on the evidence available at this trial, he cannot seriously contend that it has been proved that the late Raja was impotent. My conclusion therefore is that the plaintiff is the son of the late Raja.

Sri Krishnayya Rao v. Rajah of Pittapur. —— Venkatasubba Rao, J.

I should only like to remark in conclusion that this issue has given me much trouble, first, on account of the amazing mass of false evidence adduced for the plaintiff and secondly, on account of the impossible and unsound theories on which the defence has chosen to rest their case—theories which conflict with their own evidence and are opposed to human probabilities; but on the whole, after giving the case my best possible attention, I am prepared, though not without hesitation, to concur in the finding of the trial court that the plaintiff is the son of the late Raja and Mangayamma.

In the result, on my finding on the issue of adoption, I would, differing from my learned brother, allow the appeal and dismiss the suit with costs throughout.

By Court—As we have differed as to the result of the case the appeal will be dismissed with costs. Vakil's fee Rs. 3,000.

Memorandum of objections follows.

Dismissed. No costs.

Against this a Letters Patent appeal was preferred

Nugent Grant, T. R. Ramachandra Iyer, N. A. Krishna Iyer and *C. Rama Row* for Appellant.

A. Krishnasami Iyer, P. Kameswara Rao and *S. Venkatesa Aiyangar* for Respondent.

The Court delivered the following JUDGMENTS

Kumaraswami Sastri, J.

Kumaraswami Sastri, J.—This appeal arises out of a suit filed by the Rajah of Pittapur who claims to be the next reversioner to the Gollaprolu Estate for a declaration that the adoption of the 2nd defendant by the 1st defendant is invalid and not binding on the plaintiff and that it does not affect his rights either as reversioner under Hindu Law or as the Zamindar of Pittapuram entitled to a vested reversion in the Gollaprolu Estate on the death of the 1st defendant. The 1st defendant is the widow of Venkat Rao, the last male holder of the Zamindari who died issueless on the 4th of November 1871 and the 2nd defendant is the son adopted by the 1st defendant on the 15th of February, 1914.

The Gollaprolu Estate at one time formed part of the Pittapuram Zamindari and was granted by Gangadhara Rama Rao, the then Zamindar, to his brother Venkat Rao, by a grant filed in this case as Ex. O, dated the 8th of December, 1869. Venkat Rao died issueless on the 4th of November 1871 leaving two widows—the 1st defendant and one Venkayamma who died in 1889—and the 1st defendant who is the sole surviving widow continued in possession and enjoyment of the estate. She made an adoption of her sister's son on the 18th of August 1886 alleging that her husband authorized her to adopt. The plaintiff's father who was then the Zamindar filed O. S. No. 30 of 1886, disputing the adoption on the ground that no authority was given to her by her husband and also on the ground that her husband had no power to authorize an adoption as he had renounced any power to adopt by an agreement entered into between him and the plaintiff on the 8th of December, 1869. The

Sri Krishnayya Rao v. Rajah of Pittapur. Kumaraswami Sastri, J.

Subordinate Judge decreed for the Rajah and held that she had no authority from her husband. On the question as to the effect of the agreement, he held that such an agreement would not preclude an adoption. An appeal was preferred to the High Court and the judgment of the Subordinate Judge was confirmed on the 22nd of September 1891 (see judgment, Ex. SSSS. 4). The 1st defendant made a second adoption in 1914 and that is the adoption which is now in dispute. The following genealogical table, the correctness of which is admitted, sets out the relationship between the parties.

[For the genealogical table see p. 896.—Rep.]

On the death of the second widow of Venkat Rao, the late Rajah of Pittapur filed O.S. No. 12 of 1889 to recover one-half of the Gollaprolu estate on the ground that the estate reverts to him in default of the grantee having no male issue. The suit was dismissed on the 28th of September 1891. Ex. TTTT-1 is the judgment.

The Rajah of Pittapur who was himself issueless adopted Ramakrishna the natural father of the 2nd defendant in this suit on the 28th of September 1873. Ex. T is the document evidencing the adoption. There was bitter ill-feeling between the late Rajah and his adopted son Ramakrishna for some years before the Raja's death in July 1890. On the 5th of October 1885 the plaintiff in this suit was born. Ramakrishna was disputing the plaintiff's legitimacy and on the death of his adoptive father, Gangadhara, he filed O. S. No. 6 of 1891 to recover the Pittapur estate. His case was that the Ranee never gave birth to the Plainttiff, that he was a child who was introduced into the palace and that the adoptive father owing to bitter enmity with him, got this child introduced into the Zenana and proclaimed it to be his son by Mangayamma, the Ranee. It is also alleged that the Rajah owing to physical infirmities was impotent. The defence to that suit was that the present plaintiff was the legitimate son of the Rajah and that he was entitled to succeed to the Zamindairi by virture of a will executed by the late Rajah. After a protracted enquiry during the course of which several doctors and experts were examined as also several persons connected with the palace, Mr. Mackenzie, the District Judge, held that the present plaintiff was not the son of the Rajah of Pittapur but a child introduced into the palace and that the will would not pass any title as he was not a *persona designata* but was only given the property in the capacity of an Aurasa son which he was not. An appeal was filed to the High Court and in November 1896 the High Court reversed the decree of the District Judge on the ground that the plaintiff was a *persona designata* under the will and took the estate whether he was a son or not. The High Court in this view held it was unnecessary to go into the question as to the legitimacy of the plaintiff. An appeal was filed to the Privy Council and their Lordships of the Privy Council in February 1899 upheld the

Sri Krishnayya Rao v. Rajah of Pittapur.

Kumaraswami Sastri, J.

judgment of the High Court as regards the will and considered it unnecessary to go into the question of legitimacy. The present plaintiff attained age in 1906 and assumed management of the estate from the Court of Wards.

It will thus be seen that so far as the present plaintiff is concerned the question as to his legitimacy was left open by the High Court and their Lordships of the Privy Council and there was the decision of the District Judge against him on that point.

It is not disputed that at the date of the adoption of the 2nd defendant by the 1st defendant, the next presumptive reversioners were Ramakrishna, the adopted son of the late Rajah and the plaintiff who is said to be his Aurasa son. As the 1st defendant's authority to adopt was negatived in the litigation of 1886, it was necessary for her to get the consent of the plaintiff and Ramakrishna who were the next presumptive reversionary heirs. She applied for the consent of Ramakrishna by Ex. XV, dated the 27th of January 1914 and obtained his permission by the reply Exhibit XV (*a*), dated the 30th day of January 1914. She applied for the plaintiff's consent by the letter Ex. EE-9, dated the 2nd day of February 1914, but the plaintiff refused to give his consent by his letter Ex. EE-11, dated the 11th of February 1914. On the 15th of February 1914 the 1st defendant adopted the 2nd defendant.

The plaintiff filed the suit on the 17th of August 1915 for a declaration that the adoption of the 2nd defendant was invalid and for further reliefs.

Paragraph 7 of the plaint runs as follows:—

"7. (1) The 1st defendant frequently requested the plaintiff to render her brothers and her nephews substantial pecuniary assistance to enable them to acquire the "Voratla estate."

(2) Her brother Chelikani Seetharamaswami Garu also made a similar request more than once through the plaintiff's officers. As the request of the 1st defendant and the said Seetharasaswami Garu was not complied with, they were much displeased with the plaintiff. With a view to defeat his reversionary right and to spite him as well as to fraudulently secure a substantial portion of the Gollaprolu estate for the benefit of the 1st defendant's brothers and her nephews and to enable them also to acquire the Voratla estate, the 1st defendant, her brother Seetharamaswami Garu and her nephews conspired with the 2nd defendant and his relations who had all been bitterly hostile to the plaintiff ever since the succession suit, O. S. No. 6 of 1891 on the file of the District Court, Godavari, and arranged to take the 2nd defendant in adoption on condition that (*a*) the 2nd defendant should settle one-half of the Gollaprolu estate absolutely with powers of alienation upon the 1st defendant so as to enable her to pass the property to her brothers and her nephews; (*b*) that in addition he should give her a monthly allowance of Rs. 500 during her life charged upon the other half; (*c*)

that a cash loan of 2½ lakhs of rupees should be secured from the Rajah of Venkatagiri at a low rate of interest to the 1st defendant's brothers to enable them to acquire the Voratla estate involved in litigation with the Zamindarini of Tuni; and (*d*) that the (2nd defendant) should marry the daughter of the 1st defendant's brother Seetharamaswami Garu."

Sri Krishnayya Rao v. Rajah of Pittapur. — Kumaraswami Sastri, J.

Paragraph 8 of the plaint runs as follows:—

"After having entered into such conspiracy and having agreed to the aforesaid agreement with the 2nd defendant and his relations, without consulting the plaintiff as the head of the family and without going to him (plaintiff) or properly applying to him for his consent, the 1st defendant sent a registered letter, dated 2nd February 1914, informing him that she had resolved to adopt the 2nd defendant and asking him to consent to it. The plaintiff sent his reply on the 11th February, giving his reasons against the adoption. The 1st defendant without any further communication to the plaintiff adopted the 2nd defendant on the 15th February 1914 and sent a registered letter to the plaintiff on the 16th February 1914 containing false and frivolous allegations inconsistent with her previous conduct and admissions and recognition of the plaintiff's status throughout." In paragraph 9, he states that in pursuance of the aforesaid arrangements two deeds were executed. In paragraph 10 he gives the following reasons which according to him invalidate the adoption. They are as follows:—

(1) The 1st defendant had no authority from her husband or the plaintiff who was the head of the family to adopt the 2nd defendant;

(2) that the agreement entered into by her husband with the plaintiff's father precludes the 1st defendant from making an adoption, such agreement amounting to an implied prohibition by her husband against her adopting a son;

(3) that the 2nd defendant's father was suffering from paralysis and was physically incapable of either giving his consent or of taking any part in the ceremonies which are necessary for the adoption;

(4) the fact that the 2nd defendant's father who was in bitter terms of enmity with the plaintiff consented to give his own son in adopion would render his consent invalid;

(5) that the adoption was made by the 1st defendant 40 years after her husband's death under the influence of her brothers and nephews and from corrupt and improper motives to defeat the reversionary rights of the plaintiff and in pursuance of a conspiracy to secure the estate and other benefits for her brother's family; and that the 1st defendant's conduct showed that she had determined to adopt and did not approach the plaintiff *bona fide* for his consent, and

Sri Krishnayya Rao v. Rajah of Pittapur. — Kumaraswami Sastri, J.

(6) that the grant of 1869 of the Gollaprolu estate by his father to the 1st defendant's husband was only a maintenance grant and was not intended to enure for the benefit of an adopted son or alienee.

The defendants in their written statement denied that the plaintiff is the son of the late Rajah or of his wife Mangayamma and state that he is not a reversioner entitled to sue. They state that the adoption was made *bona fide* and for legitimate reasons and is not the result of a conspiracy or ill-feeling as alleged in the plaint; that the deeds of settlement and maintenance executed by the 2nd defendant to the 1st defendant and referred to in the plaint are *bona fide* arrangements between them and are valid in law, that the refusal of the plaintiff to give his consent was purely personal and not *bona fide* and that the refusal was due to the desire of the Rajah to get the Gollaprolu estate to himself and to make the 1st defendant to adopt his own son. It is alleged that consent was obtained from the other sapindas also referred to in paragraph 11 of the written statement. The defendants deny that Ramakrishna was not in a fit state to give his consent or to take part in the ceremonies. They state that the adoption is valid and proper. They deny the allegation in the plaint as to the plaintiff's title to the Gollaprolu estate as a vested reversion by virtue of the grant. They also deny the prohibition, express or implied, against adoption alleged in the plaint.

The main questions in this appeal are (1) whether the plaintiff is the aurasa son of the late Raja and reversioner who would be entitled to succeed to the estate on the death of the 1st defendant and (2) whether the adopion is invalid for all or any of the reasons given by the plaintiff in the plaint.

The Subordinate Judge in whose Court the case was instituted and who tried it and examined several witnesses was appointed as District Judge towards the close of the proceedings and the suit was formally transferred to him as District Judge. He decided that the plaintiff was the legitimate son, that Ramakrishna was not precluded from illness from consenting to the adoption or taking part in the ceremonies and that the adoption could not be disputed on that ground but that the plaintiff was entitled to withhold his consent as the adoption was made by the 1st defendant not *bona fide* but with a view to secure a personal advantage to herself. He decreed the plaintiff's suit.

On the issue of the legitimacy of the plaintiff, the defendants applied to put in the evidence of several witnesses in the former litigation (O.S. No. 6 of 1891) who were either dead or who could not be found. They relied on section 33 of the Evidence Act. The Subordinate Judge held that such evidence is inadmissible as the suit was not between the same parties, the 2nd defendant in

Sri Krishnayya Rao v. Rajah of Pittapur — Kumaraswami Sastri, J.

this suit not claiming through Ramakrishna although he was his natural son. On appeal Krishnan and Venkatasubba Rao, JJ., agreed with the Subordinate Judge in holding that the evidence sought to be let in was not admissible and on the evidence on record held that the plaintiff was the aurasa son of the late Raja. As regards Ramakrishna, they held that he was capable of giving his consent and that the adoption could not be impeached on the ground of Ramakrishna's ill-health or his incapacity to take part in the ceremonies. Krishnan, J., held that several of the objections of the plaintiff were futile, but that his objection that the 1st defendant was actuated by a desire to get her husband's property under her control so that she may deal with it as she pleased was valid and that though the 1st defendant may well be credited with an intention to benefit her husband's soul, her main object to get her husband's property under her control so that she may deal with it as she pleased and the widow's motive in this particular being corrupt, the plaintiff withheld his consent for adequate reasons. He was for dismissing the appeal. Venkatasubba Rao, J., as regards the adoption, was of opinion that the widow in making the adoption was not influenced by any corrupt or improper motives, that the arrangement entered into by her was a *bona fide* arrangement, that the objections raised by the plaintiff were purely personal prompted by a desire to get the estate for himself and were not *bona fide* and that the adoption was good. He was for reversing the judgment of the Subordinate Judge and upholding the adoption. Owing to this difference of opinion, the judgment of the Subordinate Judge was confirmed and hence this Letters Patent Appeal.

As regards the legitimacy of the plaintiff, Mr. Grant for the appellant contended that under section 33 of the Evidence Act he was entitled to put in the evidence of witnesses who were examined in the previous suit but who were now either dead or could not be called in this litigation. He frankly admitted that if such evidence was ruled out he could not in this appeal say that the evidence on record is sufficient to support the contention that the plaintiff is not the legitimate son of the late Raja. I am of opinion that the depositions which are sought to be put in are inadmissible, as the 2nd defendant in this suit is not the legal representative of the plaintiff in O.S. No. 6 of 1891. He is no doubt the natural son of the plaintiff in that suit, and if he were not validly adopted, he would be the legal representative, but in this suit he claims not as the son of his natural father but as the adopted son of Venkata Rao entitled to the Gollaprolu estate.

In seeing whether a person is the legal representative of another or not for the purpose of rendering evidence admissible under S. 33, regard must be had to the state of affairs when the evidence is sought to be admitted. The fact that the 2nd defendant would have been the legal representative if there was no adoption would not make him

Sri Krishnayya Rao v. Rajah of Pittapur. — Kumaraswami Sastri, J.

legal representative after the adoption for the purpose of the admissibility of evidence. As both the learned judges in appeal agree on this question and have gone into the matter fully, I do not think it necessary to go over the same ground again.

As regards the validity of the adoption, the main questions for determination are whether the adoption was not a *bona fide* act on the part of the widow but was merely a device by her to get possession absolutely of half of her husband's estate and (2) whether the plaintiff was justified in refusing his consent to the adoption.

The evidence was gone into in great detail on both sides and giving it my best consideration I have come to the conclusion that the judgment of Venkatasubba Rao, J., is right and that the adoption was not invalid.

After the adoption made by the 1st defendant in 1886 was held to be invalid, she did not give up the idea of making an adoption. It is not disputed that she consulted Mr. Srinivasa Aiyangar, a leading vakil of this Court, as early as 1901 about an adoption.

The evidence in this case shows that the 1st defedant who was about 67 or 68 years at the date of the adoption became ill two years before the adoption and wanted to adopt a boy.

So far as the boy adopted is concerned, it is nowhere suggested that owing to his health, conduct or character he was not a suitable boy to be adopted to the Golloprolu branch of the family. The Hindu Law givers enjoin that the boy to be adopted should be *'Adoora Bandhavaha'* meaning a sapinda as near as possible. The 2nd defendant was a near sapinda and having regard to the qualifications recommended in the Hindu Shastras as to adoption he would in every way be a fit and suitable person for being adopted. It is said that he was the son of a person who was a bitter enemy of the present plaintiff but it is not said that the 2nd defendant personally did anything which was improper.

In 1912 the plaintiff in this case had only one son. In 1913 another son was born to him. The plaintiff's evidence is that he wanted to give that boy in adoption to Chellayamma, a relation of his, and that he named the boy after Chellayamma's husband. So that none of his sons were available. Ramakrishna the plaintiff's adopted brother had four sons. The 1st defendant opened negotiations with him for the adoption of one of his sons. About a year before the adoption actually took place, she approached Ramakrishna, but Ramakrishna was unwilling to give his boy in adoption as the 1st defendant was friendly with Pittapur and he thought he would be sending his son to the enemy's camp by allowing the adoption. Negotiations continued and were carried on through Pakam Kuppiah, defendant's 1st witness, C. Seetharamayya (1st defendant's brother) defendant's 27th witness and her nephew, C. Venkayya, defendant's 22nd witness. Mr. P. V. Krishnaswami Chetti one of

Sri Krishnayya Rao v. Rajah of Pittapur. — Kumaraswami Sastri, J.

the leading vakils of this Court who had retired from active practice but who was the legal adviser to the Maharaja of Venkatagiri, the natural brother of Ramakrishna, was approached about two months before the actual adoption with a view to get Ramakrishna's consent by getting the Maharaja of Venkatagiri to use such influence as he had to get over any prejudice which Ramakrishna had to giving one of his sons in adoption. Mr. Krishnaswami Chetti acted in the matter and on the advice of Mr. Krishnaswami Chetti and the Maharaja of Venkatagiri, Ramakrishna agreed to give the 2nd defendant in adoption. Having secured what in her opinion was a suitable boy, she had to get the consent of the nearest sapindas as it has been laid down by their Lordships of the Privy Council that the consent of the sapindas required by a widow is that of the next presumptive reversioner and not the consent of the remoter reversioners. As the plaintiff refused to give his consent but as the only other nearer sapinda had agreed to give his boy, the 1st defendant came to Madras to make the adoption.

After Ramakrishna had given his consent, questions arose as to the payment of the 1st defendant's debts which were then said to be about rupees 2½ lakhs. Ramakrishna was approached on the question as to the 2nd defendant who was to be adopted paying those debts, and Ramakrishna referred the matter to the 2nd defendant who was then a major and whose consent would be necessary. The 2nd defendant did not want to be bothered with the debts and suggested that he would give half the estate to the 1st defendant, she paying all the debts and the 2nd defendant not being liable. The question also arose as to the maintenance of the 1st defendant as the half given would go to pay debts and the 2nd defendant on the advice of the Maharaja of Venkatagiri agreed to pay her Rs. 500 a month and in pursuance of this agreement the 2nd defendant executed two deeds (Exs. XVII and XVII (*a*)) giving one-half of the estate to his adoptive mother and Rs. 500 a month for maintenance. These deeds were executed the day after the adoption was actually made.

The evidence on this part of the case on the defendants' side is that of the 1st defendant who was examined as defendants' 8th witness, of Pakam Kuppiah, defendants' 1st witness, of Mr. P. V. Krishnaswami Chetti, defendants' 9th witness, of Venkayya, defendants' 22nd witness, of C. Seetharamayya, defendants' 27th witness and of the 2nd defendant who was examined as defendants' 49th witness. The evidence of these witnesses has been referred to in detail by Venkatasubba Rao, J., and I need not set it out in detail again. As against this evidence, there is the evidence of Narasinga Rao who was examined as plaintiff's 113th witness. The Subordinate Judge has disbelieved him on several material points. He has clearly perjured himself as regards Exs. XVI and XVII. Krishnan, J., did not place much reliance on him. I

Sri Krishnayya Rao v. Rajah of Pittapur. — Kumaraswami Sastri, J.

agree with Venkatasubba Rao, J., in thinking that no reliance can be placed on the evidence of this witness.

As regards the motive of the widow in making the adoption, Krishnan, J., was disposed to accept the statement of defendants' 1st witness that the idea of adoption was first mooted about a year before the actual adoption took place. He also observes "the 1st defendant may well be credited with an intention to benefit her deceased husband's soul as that is always a consideration for an adoption but her main object was undoubtedly to get her husband's property or as much of it as she could get into her own hands absolutely." In another part of the judgment the learned Judge says: "Whatever weight one may attach to the religious benefits flowing from an adoption, one cannot ignore the secular rights flowing from it." According to the learned Judge, the widow was not acting solely with a desire to benefit herself personally and with a corrupt motive but with mixed motives (1) desire to adopt, and (2) desire to benefit herself personally.

In dealing with this part of the case I think it is necessary to have regard to the fact that she was an old woman who was ill and who was apprehensive that she would not live long. There is no cross-examination of the 1st defendant or her witnesses who say she was ill though it is now suggested that she was quite well at the time. In the absence of any cross-examination as to this point I see no reason to doubt the fact of her illness. She made the first adoption in 1880 alleging an authority from her husband which the Court in the suit by the late Raja of Pittapur found to be false. It is not suggested that in the first adoption she made when she was much younger she reserved any personal benefit to herself. It is no doubt true that she adopted her sister's son but it should be borne in mind that at that time the then Raja of Pittapur was himself issueless and he had to adopt Ramakrishna. Ramakrishna had at that time no sons whom he could give in adoption. It is not suggested that there were any boys among the sapindas who could be adopted. If she was bent on getting absolutely any portion of her husband's estate, she as a wordly woman would certainly have provided for it when she was adopting her sister's son who would raise no objection as there was no guarantee that though he was her sister's son he would treat her with affection after the adoption was completed and the boy grew up. In 1901 she consulted Mr. S. Srinivasa Aiyangar, a leading vakil who now appears for the plaintiff in this suit, and it is not suggested that when she consulted him as to adoption she bargained for any terms for herself. It is also to be noted that the plaintiff in this suit who was born in 1885 attained age in 1916 when he got possession of the estate from the Court of Wards. The only other sapinda whose consent was necessary was Ramakrishna. If she wanted to make an adoption

Sri Krishnayya Rao v. Rajah of Pittapur.

Kumaraswami Sastri, J.

and secure a personal benefit for herself, there was nothing to prevent her from making the adoption with the consent of Ramakrishna who was the sole reversioner whose consent was necessary till the plaintiff attained majority in 1906.

Although it was stated that Ramakrishna got a personal bribe and consented to the adoption, this point was not pressed before us and no objection is urged to the adoption on this ground. So far as the evidence goes, far from seeking any personal advantage to himself, Ramakrishna was unwilling to give his son in adoption. In addition to the evidence on the defendants' side, there is the evidence of Narasinga Rao, plaintiff's 113th witness who though entirely hostile to the defendants, deposes as follows in cross-examination : "About the adoption Pakam Kuppiah was coming and telling me before that. I remember only one occasion when he spoke to me about the adoption. It was in January, a few days before this conversation. He told me that he approached Mr. Ramakrishnayya about the adoption and that Ramakrishnayya was not willing to give the boy in adoption and that he had asked Kuppiah to pack away."

A great deal of the argument turned on the adopted son giving one-half of the estate to the adoptive mother and on his also agreeing to pay Rs. 500 a month for maintenance. As I said before, the evidence on this part of the case is that after the adoption had been settled, reference was made to the debts of the 1st defendant the adoptive mother and the boy was asked to pay those debts, and that the suggestion of the adopted son was that he should not be saddled with the debts but that he would give half the estate to her so that she could pay her debts out of the estate.

On this part of the case the contention of the plaintiff as set out in the plaint and in the evidence of the witnesses was that the 1st defendant's brother C. Seetharamayya was engaged in a litigation as regards the Voratla estate, that he bought the equity of redemption, the mortgagee being the Rani of Tuni, that a suit was pending in the Vizagapatam Court and the 1st defendant's brother wanted Rs. $2\frac{1}{2}$ lakhs to settle the claim and that it was to provide for this sum to settle that claim the widow wanted Rs. $2\frac{1}{2}$ lakhs to be paid by the adopted son and got a deed for one-half of the property. It is stated that Rs. $2\frac{1}{2}$ lakhs was raised by the 1st defendant by executing the mortgage (Ex. XVIII) in favour of the Maharajah of Venkatagiri.

The suit about the Voratla estate was O. S. No. 30 of 1910 in the Vizagapatam Sub-Court. It is admitted that there was no settlement in that suit and that the plaintiff in that suit got a decree for about Rs. 7 lakhs. There can be little doubt however that in 1913 the 1st defendant and her brother hoped that the suit would be settled for Rs. $2\frac{1}{2}$ lakhs, and applied to the plaintiff for help which he was unwilling to grant. Letters (Ex. EE to EE-8)

Sri Krishnayya Rao v. Rajah of Pittapur — Kumaraswami Sastri, J

were filed to show that an application was made to the plaintiff for help in respect of the Voratla claim. It is however conceded before us that neither Rs. 2½ lakhs nor any other sum was paid in respect of the Voratla litigation by the 1st defendant or her brother and that no portion of the money which the 1st defendant raised by mortgaging her half-share to the Maharajah of Venkatagiri under Exhibit XVIII went to meet any claim in connection with the Voratla litigation.

The case for the defendants is that the 1st defendant had debts to pay amounting to about Rs. 2½ lakhs, that when she was making the adoption she naturally was concerned as regards these debts and asked the adopted son to pay off those debts and that the adopted boy suggested that instead of his paying the debts, the adoptive mother could pay them out of the half-share of the estate which he would give her.

So far as I can see, only two cases were put forward at the trial. The plaintiff's case was that this arrangement as to Rs. 2½ lakhs had nothing to do with the debts of the 1st defendant but was merely a device by the 1st defendant to get half the estate on which she could raise money to help her brother in the Voratla litigation and that she actually did so by getting a loan from the Maharaja of Venkatagiri of Rs. 2½ lakhs. The case for the defendants is that it was to pay her debts that she raised a loan from the Maharaja of Venkatagiri and it had nothing to do with the Voratla litigation and that out of the loan so raised she discharged her debts.

The case for the plaintiff as to the Voratla motive has entirely failed. It was not pressed before us in this appeal, but the plaintiff wants to turn round and say that the 1st defendant has not proved that she had debts of her own to the extent of Rs. 2½ lakhs and that they were her brother's debts which she wanted to pay. It is argued that the 1st defendant has not proved each item of the debt which she is alleged to have paid and so these were not her debts but her brother's. It is complained that she has not produced vouchers or accounts and it was sought to treat this case as if the 1st defendant was called upon by the pleadings or evidence to prove each item that went to make up the debt of Rs. 2½ lakhs which she says she paid. I do not think that the plaintiff who fails to prove the specific case set up by him is entitled to say that the 1st defenadnt should prove every item.

As regards the debts said to have been discharged, there can be little doubt that the whole of Rs. 2½ lakhs went to discharge the debts. Exhibit XVIII is a mortgage, dated the 25th of July 1914, executed by the 1st Defendant and her brother and her brother's sons in favour of the Maharajah of Venkatagiri. It begins by stating that the amount of Rs. 2,50,000 was borrowed for the purpose of clearing the debts borrowed by the executants. Venkayya, one of the executants of the document, states that this loan was arranged 2 or 3 months prior to the execution of the

Sri Krishnayya Rao v. Rajah of Pittapur. Kumaraswami Sastri, J.

mortgage bond, *i.e.*, about the month of May, the adoption being in February. He says that the loan was taken for the purpose of liquidating the debts of the 1st defendant and that her debts were discharged out of the money got by the mortgage. He denies that any money was needed at that time for the Voratla litigation. In cross-examination he states that he was present when some of the 1st defendant's debts were discharged and that the debts of the 1st defendant on khathas and promissory notes were partly in her name and partly in the names of himself and his brothers and 1st defendant's brother. He states that the debts of his own family would be about Rs. 60,000 or Rs. 70,000, that there were outstandings also to that extent and that at the time of 2nd defendant's adoption their own debts would have been Rs. 40,000 or Rs. 50,000. He says that he was present when debts amounting to Rs. 25,000 or Rs. 30,000 of the 1st defendant were discharged. Kuppiah, defendant's 1st witness who negotiated the loan from the Maharaja of Venkatagiri, says that the talk about the Maharaja of Venkatagiri lending money arose more than 3 months after the adoption, that the 1st defendant wanted a loan to discharge her debts, that the Maharaja of Venkatagiri when approached agreed to give a loan provided there was adequate security, and that the Maharaja, when informed that one-half of the Gollaprolu estate which the 1st defendant got would be given as security, thought that the security was insufficient and said he would give the loan only if her brother and nephews would also execute the mortgage deed and include their properties also. The fact that the debts to be discharged are said to be the debts of the executants does not show that the debts are not the debts of the 1st defendant. It is usual, when more than one person executed a document alleging that money was borrowed to pay debts, for the lender to get a general statement that the debts were the debts of the executants and not to give room for future contention by stating what the debts of each of the executants were. He says that as regards the debts due by the 1st defendant there were registered mortgages for Rs. 10,000, promissory notes for Rs. 40,000, pledges of jewels and money received on chits, and that after discharging those debts he took back those vouchers and gave them to the Maharaja of Venkatagiri. He says that the 1st defendant told him that she contracted debts for litigation and other expenses, that no portion of the money lent by the Maharaja was utilized for the Voratla litigation and that after discharging the 1st defendant's debts there was a balance of only Rs. 10,000 which he handed to the 1st defendant. He swears that no portion of the money received from the Maharaja of Venkatagiri went towards the liquidation of any portion of the debts of the 1st defendant's brother's family.

It is usual for a person lending money on mortgage for discharging debts to get the cancelled documents and vouchers and

Sri Krishnayya Rao v. Rajah of Pittapur. —— Kumaraswami Sastri, J.

keep them as evidence should any disputes arise as to consideration and it is quite probable that these vouchers were given to the Maharaja of Venkatagiri. It does not appear that the Raja or his Dewan was subpoenaed to produce the vouchers. All that appears from the evidence of Kalyana Rao, defendnts' 28th witness, is that the Maharaja of Venkatagiri was subpoenaed by defendants to produce some documents and that he handed over to Kuppiah the documents mentioned in the summons. It appears that the summons which the witness speaks of was the subpoena taken out by the defendants and it does not appear that the plaintiff took out any subpoena. The witness states that defendants' 1st witness did not hand over to the Maharaja of Venkatagiri the documents evidencing the debts discharged out of the consideration for the mortgage but admits that he did not make a search of all the records and that he only searched a box containing letters from the Raja of Pittapur. The 1st defendant in her deposition states that she had at the time of the adoption debts to the extent of Rs. 2½ lakhs and that arrangements were then made to discharge those debts. This is what she says:

"I said to the 2nd defendant that he might take the whole estate and discharge my debts He said he would take half and that I might take the other half of the estate and discharge my debts The said settlement deed thus gave me half the estate for discharging my debts . . . I arranged to discharge my debts and for that purpose I took a loan from the Maharaja of Venkatagiri. I borrowed Rs. 2½ lakhs from him and executed a mortgage deed to him"

She says that the debts referred to were her own debts and not her brothers' debts and that as the brothers executed the document and mortgaged their properties also, the Maharaja wanted that the debts should be described as the debts of all of them. She says that some of her debts were on pledge of jewels and that Kuppiah, defendants' 1st witness, and Prakasam brought money from Venkatagiri and discharged the debts. She says that all her debts were paid off. The 2nd defendant who is the adopted son states that the talk about giving half the estate to the 1st defendant was about a week or 10 days before the deeds were executed. This is what he says:

"P. Kuppiah (D.W. 1) spoke to me about them. He told me that the 1st defendant sent word to my natural father that she wished to adopt me on condition of my taking the whole estate and discharging her debts myself and that my natural father sent word through him to ascertain if I was willing to that course and if not what my opinion on the matter was. I replied that it would be better if I were given half the estate free of debts, the 1st defendant herself taking the other half with the debts and that I would abide by the opinion of the elders on that matter. D.W. 1 went and consulted my natural father and came back to me and told me that my natural father agreed to my proposal."

He says that he did not know if there was a talk before the adoption about a loan from the Raja of Venkatagiri and that he

heard of it only 3 or 4 months after the adoption. The evidence was given by him in Telugu and when it was interpreted to him, he wanted to correct himself, by saying that defendants' 1st witness, when he spoke to him about taking the whole estate with the debts did not say anything about the adoption. The Judge notes that the witness stated what was recorded in the deposition. The evidence was all taken in one day and it is argued for the appellant that in view of that fact his correction could not be an afterthought, that as the deposition was given in Telugu (the Judge being a Tamil gentleman) too much importance should not be attached to the word "condition" in his deposition and that reading the evidence as a whole it cannot be said that the adoption was conditional on his giving half the estate. C. Seetharamayya (defendants' 27th witness) who is 1st defendant's brother states that after the adoption was settled, the 1st defendant asked the 2nd defendant to take the estate and discharge her debts and that the 2nd defendant replied he would not discharge the debts but that he would give her half the estate with absolute rights and she might discharge the debts herself. He says that the loan under Ex. XVIII was borrowed to discharge the 1st defendant"s debts, that the debts were debts partly borrowed in her name and partly in his name when the creditors hesitated to give money on the ground that the 1st defendant was a widow, that all these debts were borrowed for the 1st defendant and that they would be entered in the chittas. He was asked in cross-examination about some of the debts discharged and he says that most of the documents were executed by him or his elder brother or Venkayya whoever happened to be present and some jointly by all of them, that they were executed for the 1st defendant's purposes and that she would pay moneys to them from borrowed moneys. This is what he says:

"They were executed for her purpose and she would pay us not only from these borrowed moneys and also other funds of hers. She would give us as much out of the borrowed moneys as she liked. As the 1st defendant was a female, the people were not willing to lend her money and the creditors were not satisfied that the moneys lent by them were for purposes binding on her estate The 1st defendant also used to borrow sometimes in her own name."

He says that his joint family has got properties yielding about Rs. 40,000 and that they have still debts to pay.

As regards the income of the Gollaprolu estate, the net income is said to be Rs. 40,000 a year, which will be about Rs. 3,400 a month. The fact seems to be that the 1st defendant who had no nearer relations of her husband treated her brothers and her sisters and their children with great affection. She was spending large sums upon them and there can be little doubt that she was spending the income of the estate on herself and her brothers and sisters and their children. There can also be little doubt on the evidence that the debts which she had at the date of the adoption would not bind the rever-

Sri Krishnayya Rao v. Rajah of Pittapur.

Kumaraswami Sastri, J.

sioners. They were purely her personal debts. So long as she was in possession of the estate she could use the income as she pleased, but she could not mortgage or encumber the estate so as to be valid beyond her lifetime and it is only natural that the creditors hesitated to lend large sums of money to her as they would lose the money if she died or made any adoption and she had to borrow through her brothers and nephews who according to the evidence had property yielding about Rs. 40,000 a year. As her brothers and nephews were well off, there was no difficulty for her in getting loans through them. It appears from the evidence that out of the debt of Rs. 2¼ lakhs which had to be paid, Rs. 50,000 were debts in her own name for which she could be sued and the rest was borrowed by her brothers or nephews at her request. If she was minded to defraud her creditors, she could have made an adoption and left the creditors unpaid. She however did not want to adopt this course but was anxious that the debts incurred by her or incurred at her request should be paid. At the time of the adoption she was ill and according to Hindu notions the sin arising from a person dying with his debts unpaid applies equally to women though in the case of a man leaving sons the law has made the pious obligation to save the father from the consequences of the sin a legal obligation. I do not think a widow who makes an adoption and stipulates that the adopted son should pay her debts is doing anything corrupt or immoral. On the contrary I should think that she is doing an honourable thing. It has now been settled by their Lordships of the Privy Council in *Krishnamoorthi Aiyar* v. *Krishnamoorthi Aiyar,*[1] that an adoption made by a widow on condition that she should enjoy the income of the estate during her lifetime would in the Madras Presidency be valid even though the adopted boy was a minor and his father entered into the arrangement. Though she will be securing a personal benefit and though the adopted son may for several years be deprived of the estate, the adoption will be valid. If after the adopted son comes of age he commutes the interest reserved by the widow into an absolue share of a portion of the estate, it cannot be said that the transaction will be void. If the adopted son is at the time of adoption a major capable of contracting as he was in the present case, I can find nothing illegal in the widow requiring the adopted son to pay her debts. If the adopted son instead of undertaking the burden thinks that it is in his interests to get an unburdened share of the estate and makes the widow to pay her debts out of any share allotted to her, I find it difficult to see how the adoption would be invalid as being made from a corrupt motive. The case may be different if the widow had no debts to pay or if the proportion of the estate granted to her was so disproportionate to the debts that the Court can on the evidence

---

1. (1927) L.R. 54 I.A. 248: I.L.R. 50 Mad 508: 53 M.L.J. 57 (P.C.).

Sri Krishnayya Rao v. Rajah of Pittapur.

Kumaraswami Sastri, J.

treat it as a device pure and simple by the widow under the guise of an adoption to get a large share of her husband's estate to herself. In the present case the net income of the estate is said to be Rs. 40,000 a year and half the income would be Rs. 20,000 a year.

The Maharaja of Venkatagiri who lent Rs. 2¼ lakhs thought that the estate was not sufficient security although at the time of the mortgage the widow had absolute title to half the estate and it cannot be said that if there were debts to pay amounting to Rs. 2¼ lakhs, the arrangement was one which the Court would hold to be mere device to get an absolute property. As a matter of fact, the half which she got from the adopted son was in 3 or 4 months after the adoption mortgaged to the Maharaja of Venkatagiri and the debts were paid off. She had no other means to pay the debts so that any possible advantage which she might get would be any surplus remaining after the debts were paid. Meantime interest was payable on the mortgage for Rs. 2¼ lakhs. Having regard to all the facts in this case I am of opinion that the adoption was made without any corrupt motive by the widow. While on the one hand she wanted to adopt in order to advance her husband's and her spiritual welfare she did not want to evade payment of the debts which she considered legally or at least morally binding on her. It is no doubt true that these debts would not bind the reversioner if he chose to contest them. But at the same time it cannot be said that her stipulating for the discharge of the debts which she owed and which she could pay out of the income of the estate even after adoption by making it a condition that she should remain in possession of the estate for her lifetime makes the adoption invalid as being made from a corrupt motive.

It has been argued for the respondent that it was only when she found that the plaintiff would not give her brothers Rs. 2½ lakhs for the purpose of the Voratla estate litigation that she conceived the idea of adoption as a means of raising money to help her brothers and that the motive was therefore corrupt as she wanted under the guise of an adoption to get a personal gain to her brothers. I do not think the evidence supports this conclusion.

Exhibits EE series and the evidence of the plaintiff and his Dewan show when the request for money was made. It appears from the date that the 1st defendant resolved to adopt the 2nd defendant before the refusal of the plaintiff to accede to her request for money to help her brothers. The letters to the plaintiff asking for money are Exs. EE, EE-2, EE-5 and EE-8. Ex. EE is not dated, but it is argued that the evidence shows that it must have been in May or June 1913. It says that her brothers were anxious to buy the Voratla estate and requests the plaintiff to give them pecuniary help. Ex. EE-2 states that if he was willing to render the help asked for, her brother would come and explain matters. It concludes by saying that the matter about the Voratla estate has

Sri Krishnayya Rao v. Rajah of Pittapur.

Kumaraswami Sastri, J.

got to be settled at once and requesting for an immediate reply. In Ex. EE-5 she reminds the plaintiff of her request and states that if he does not help her brothers, they would give up the Voratla estate and that they have taken a week's time to settle the matter. Ex. EE-8 is another reminder where she wants a definite reply whether he would help her brothers or not. It appears from Ex. EE-16 that a person called Kondayya was paid on the 3rd January 1914 Rs. 8-2-9 for going from Undoor, the 1st defendant's place to Pittapur, and it is suggested that the letter Ex. EE-8 was the letter which the man took and it is sought to fix the date as January 1914. There is however nothing in Ex. EE-15 or EE-16 to support this. Though the 1st defendant denied that she wrote these letters, I do not think there is sufficient reason for differing from the Subordinate Judge who was of opinion that the letters were written by the 1st defendant especially as it is not denied that she did apply to the plaintiff for help in connection with her brothers purchasing the Voratla estate.

Mr. P. Seetharamayya who was Dewan of Pittapur from October 1910 to September 1913 states that about 3 or 4 months before his term as Dewan expired, defendants' 27th witness C. Seetharamayya came to him and asked him to suggest to the plaintiff that the latter may make a gift of Rs. 2½ lakhs to him as he wanted to clear some heavy debt in connection with an estate of which the Rani of Tuni was the mortgagee. This evidently refers to the Voratla estate litigation. He says that he referred Seetharamayya to the Raja as it was not a matter in which the Dewan had anything to do. The plaintiff states that the 1st defendant personally asked him about the pecuniary help shortly after the birth of his second son in October. The plaintiff sent no reply to these letters and he says that he never refused in so many words to accede to the request of the 1st defendant when she asked him for help personally. I have already referred to the evidence which shows that the 1st defendant entertained the idea of adopting the 2nd defendant about a year before the actual adoption.

Mr. Krishnaswami Chetti, defendants' 9th witness, who was one of the leading vakils of this Court and who retired from active practice owing to hardness of hearing but who continued to practise in Chambers states that more than two months before the adoption took place he was consulted by Pakam Kuppiah and C. Seetharamayya on behalf of the 1st defendant as regards adoption. There is absolutely no reason to disbelive the evidence of Mr. Krishnaswami Chetti, who was a well known and highly respected vakil of this Court. So that it is clear that the 1st defendant before she had any reason to expect that the plaintiff would not accede to her request was taking steps to adopt the 2nd defendant.

Sri Krishnayya Rao v. Rajah of Pittapur.

Kumaraswami Sastri, J.

So far as the Voratla estate is concerned, neither Rs. 2½ lakhs nor any other sum was paid to the Tuni Rani and the letter that I have referred to (Ex. EE-5) shows that a week's time was obtained for settlement and evidently by the beginning of January 1913 the compromise fell through and there was no necessity for the payment of any money to the Tuni Rani. The suit took its own course and ultimately there was a decree for a large sum. No portion of the Rs. 2½ lakhs raised from the Maharaja of Venkatagiri was paid towards this decree. The contention that the adoption was merely a means to get Rs. 2½ lakhs to pay the 1st defendant's brothers in order to enable them to purchase the Voratla estate has no foundation.

The conclusion I have come to on this part of the case is that the 1st defendant who was an old lady and whose health was failing her from about two years before the adoption wanted to make an adoption, that when she conceived the idea of adoption the only near sapinda boy available was one of the sons of Ramakrishna, that Ramakrishna was not willing to give one of his boys in adoption as she was on friendly terms with the plaintiff, that ultimately at the instance of Kuppiah, Mr. Krishnaswami Chetti and the Maharaja of Venkatagiri, Ramakrishna was persuaded to give one of his boys in adoption, that the 1st defendant's idea in adopting the boy was not to get Rs. 2½ lakhs for the purpose of helping her brothers in connection with the Voratla litigation, that the unwillingness of the plaintiff to advance Rs. 2½ lakhs was not the reason why she wanted to make the adoption, that after the adoption was resolved upon and settled and Ramakrishna's consent was got, questions arose as to the debts which she said she owed and that the arrangement whereby the adopted son agreed to give half the estate to the 1st defendant was the result of an offer from the adopted son as a means to enable her to discharge her debts.

I do not think the plaintiff has proved that the debts which were actually discharged by the 1st defendant were entirely the personal debts of her brothers. She no doubt obtained an advantage as the debts which she considered she had to pay were discharged; but it is not every personal benefit which the widow obtains that could invalidate the adoption. As I said before, she could contract with the adopted son or his guardian to enjoy the whole estate during her lifetime leaving nothing for the adopted boy till her death. Krishnan, J., was of opinion that her motive for adoption was not purely a desire to get an advantage for herself but that she was actuated by religious motives and also a desire for personal gain. Venkatasubba Rao, J., held that her motive was not corrupt.

So far as the adoption is concerned, it is a religious sacrament according to Hindu Law-givers as a marriage. The necessity for the adoption of a son in the case of childless Hindus is insisted upon as an act necessary for their salvation and is looked upon as very

Sri Krishnayya Rao v. Rajah of Pittapur — Kumaraswami Sastri, J.

meritorious. It is in fact looked upon as so meritorious that in Bombay the authority of the husband is unnecessary as such authority according to the leading commentators may be presumed for so meritorious an act.

Secular motives do come into play and influence persons in making adoption. Where an adoption is made by a widow both in fulfilment of her religious duties and also for the purpose of getting a gain for herself, it seems to me the proper thing is to hold that the adoption would be valid while any arrangement for her personal benefit, if not within the limits actually allowed by law, would be void. No case has been cited where in such cases the adoption has been set aside; but the Court always confined itself to declaring the arrangement limiting the adopted son's rights voidable at his instance.

In *Bhasba Rabidat Singh* v. *Indar Kunwar,*[2] which was a case from Oudh (Northern India) the adoption was questioned on the ground that the widow agreed with the natural father that she should retain the whole estate during her lifetime. Though such an agreement would be valid in Southern India by virtue of a custom as decided by their Lordships of the Privy Council in the 50 Madras case above referred to, it would not be valid in other parts of India. Their Lordships of the Privy Council were of opinion that this did not render the adoption conditional and did not affect the rights of the adopted son, but they stated that even if it amounted to a condition on which the adoption was made, the condition would be void without invalidating the adoption. It has been argued for the appellant that where it is found that the widow was actuated by consideration of spiritual benefit to her husband in making the adoption, Courts cannot analyse her motives and see the proportion of the spiritual and secular motives. It is also argued that the question of a widow's motive cannot be gone into when she had made an adoption. Reference has been made to Mayne's Hindu Law, 9th edition, articles 120 to 129 especially article 128, page 170, and to *Ramachandra Bhagavan* v. *Mulgi Nanabhai,*[3] and *Mahableshwar* v. *Durgabai.*[4] As I find on the evidence that a corrupt motive has not been proved, it is unnecessary to discuss this aspect of the case. Were it necessary, I would incline to the view that the Court cannot set aside an adoption by going into consideration of the motives of the widow making the adoption.

I am of opinion that even if it is shown in this case that the 1st defendant wanted to get a personal benefit for herself, the adoption could not be set aside on that ground.

The next question is whether the adoption is invalid owing to the plaintiff having refused to give his consent to the adoption.

2. (1889) L.R. 16 I.A. 53: I.L.R. 16 Cal. 556 (P.C).
3. (1898) I.L.R. 22 Bom. 558 (F.B.).
4. (1898) I.L.R. 22 Bom. 199.

Sri Krishnayya Rao v. Rajah of Pittapur. — Kumaraswami Sastri, J.

It is now settled by their Lordships of the Privy Council in *Veerabasavaraju* v. *Balasurya Prasada Rao*,[5] that the sapindas whose consent is necessary to validate an adoption by a widow are the nearest and not the remote ones. It is therefore unnecessary to refer to the previous decisions which leave it in doubt as to who are the sapindas that should be consulted.

At the time of the 2nd defendant's adoption and the negotiations which preceded it, the nearest sapindas were Ramakrishna, the father of the boy arranged to be adopted and the plaintiff, assuming that the plaintiff was the aurasa son of the late Raja of Pittapur. The question as to the plaintiff's legitimacy was at that time undecided. Mr. Mackenzie, the District Judge, after a protracted trial and after considering the evidence of several doctors and expert witnesses had found that the plaintiff was not the son of the Raja of Pittapur. That finding remained unreversed as both the High Court and their Lordships of the Privy Council decided the case on the question of the will and the plaintiff herein being a *persona designata* The 1st defendant acting under legal advice did not want to take the risk of deciding for herself whether the plaintiff was or was not the son of the late Raja and she applied to the plaintiff for his consent.

Exhibit EE-9 is a letter, dated the 2nd of February 1914. It runs as follows:

"I am very anxious to adopt a son for securing a good end to my late husband, performing his ceremonies, etc, and perpetuating the progeny (line). Further, in adopting, I intend adopting Sri Krishnayya, the fourth son of Sri Rajah Rao Vekata Surya Mahipathi Ramakrishna Rao Bahadur, the adopted son of the late Raja of Pittapuram. But under the decree in O.S No. 30 of 1886 on the file of the Sub-Court, Cocanada, and under the decree in the appeal against it in the High Court, it has been found that I have no authority from my husband to adopt. I therefore write this letter to you earnestly requesting your permission for me to adopt the said boy. Please to consider and reply soon Please bestow some thought."

It is argued for the respondent that the 1st defendant did not really want to consult the plaintiff, and that the terms of the letter were not respectful as it was addressed to him as Zamindar of Pittapuram and not as Raja of Pittapuram. I see little force in this argument as the plaintiff himself when examined said that there was nothing wrong in the letter as it stood. This is what he says: "I see Ex. EE-9. I now read it. I am not prepared to say whether there was any impropriety or defect in the language or substance of this letter." To this letter written on the 2nd February the plaintiff sent a reply on the 11th of February (Ex. EE-11). The letter runs as follows:—

"The letter written by you on 2nd February 1914 reached me on 4th February 1914. I have come to know that you are not adopting with an

5. (1918) L.R. 45 I.A. 265: I.L.R. 41 Mad. 998: 36 M.L.J. 40 (P.C.).

Sri Krishnayya Rao v. Rajah of Pittapur. — Kumaraswami Sastri, J.

honest purpose either for the spiritual salvation of your deceased husband or for the perpetuation of his line, but bearing spite against me for my not rendering pecuniary help to your brothers as requested by them and you, and with a view to put me to loss and for the selfish gain of all of you, you have intrigued with Rajah Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur Garu who has been my longstanding enemy and arranged to adopt his son.

(2) That you have resolved upon making the adoption with the motive mentioned in paragraph 1 supra and have not applied for my consent with an honest mind will be evident from the very fact that instead of asking for permission to adopt a suitable boy you wrote to me to say that you wanted to take in adoption the fourth son of Sri Rajah Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur Garu and were very desirous of having my consent for the same.

(3) Had you come to me and told me the necessity that has arisen for you to make an adoption and the reasons for adopting that boy, I would have been in a position to discuss with you about it in person and express my opinion to you.

(4) You, your brothers and Sri Rajah Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur Garu having joined hands in the manner set forth above in order to put me to loss, you and your brothers having made some arrangements for yourselves, as consideration for your agreeing to adopt his son, and you having given him some consideration for his according consent to you to make an adoption, and having thus decided upon the arrangements, you and your brothers went to Madras and being bent upon adopting that boy, you wrote to me the letter merely for the sake of formality and not with an honest desire to obtain my consent.

(5) In pursuance of the arrangement that was made by your late husband and my father, the late Sri Rajah Rao Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu, you were precluded by your husband from making an adoption.

(6) The consent given by Sri Rajah Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur Garu, for his own gain, to your adopting his son is not valid.

(7) Further, I being the aurasa son, Sri Rajah Rao Venkata Surya Mahipathi Rama Krishna Rao Bahadur Garu, who is an adopted son has no authority to give the consent. It is therefore not possible to give you consent as desired in your letter. Please to consider."

To this, the 1st defendant sent Ex. EE-12, dated the 16th February 1914, denying that she was actuated by any corrupt or improper motive and stating that she is not precluded from adopting by reason of any agreement between her husband and the late Raja of Pittapur. She refers to the difficulties she had in persuading Ramakrishna to give his boy in adoption and states that the real reason for the plaintiff's refusal was that she did not agree to his proposal that she should wait until another son was born to him and take that boy in adoption. This letter was written on the day after the adoption.

As regards the consent of sapindas, although the authorities hold that the person who should give the authority is the nearest

Sri Krishnayya Rao v. Rajah of Pittapur. Kumaraswami Sastri, J.

sapinda who *ex-hypothesi* would lose the estate if the widow died before him, the sapinda is not entitled to withhold his consent from corrupt or improper motives. What the sapinda has to see is the interest of the family to which adoption is made.

The law also has been settled that where there are only two sapindas who have to be consulted and one of them refuses his consent for motives which the Court holds to be improper, the Court will ignore such refusal and hold that the adoption is valid if the consent of the other sapinda has been obtained for the adoption. In the Ramnad case (*The Collector of Madura* v. *Muthuramalinga Sethupathi*[6] their Lordships of the Privy Council, observe:

> "The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence rather than the necessity of procuring the consent of all those whose possible and reversionary interest would be defeated by the adoption. There should be such evidence of the assent of the kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive."

This assumes that the person whose consent is asked is a person who is himself actuated by correct or proper motives in seeing whether the adoption should be made or not.

In *Parasara Bhattar* v. *Ranga Bhattar*,[7] Sir Charles Turner, C.J., and Innes, J., were of opinion that the assent of some of the sapindas equally distant from the deceased is sufficient if *bona fide* given when the assent of others is refused from improper motives or without a fair exercise of discretion. This was a case where there were two sapindas one of whom consented to the adoption and the other refused to give his consent unless his son was adopted.

In *Venkata Krishnamma* v. *Annapurnamma*,[8] it was held that where a sapinda who is consulted and who refuses to give his consent without giving any reasons for it cannot question the adoption made with the consent of the other sapindas. Though this decision will not be authority, after the ruling of the Privy Council in *Veerabasavaraju* v. *Balasurya Prasada Rao*[5] for the view that a remoter sapinda could be consulted, is authority for holding that a sapinda whose refusal is not proper can be ignored.

In *Venkatapathi* v. *Punnamma*,[9] it was held by Wallis, C. J., and Hannay, J., that in giving or refusing his consent a sapinda is not entitled to proceed upon grounds personal to himself but must act with a deliberate consideration for the benefit of the

5. (1918) L.R. 45 I.A. 265: I.L.R. 41 Mad 998: 36 M.L.J. 40 (P.C.).
6. (1868) 12 M.I A. 397.
7. (1880) I.L.R. 2 Mad. 202.
8. (1900) I.L.R. 23 Mad. 486.
9. (1915) 1915 M.W.N. 236.

Sri Krishnayya Rao v. Rajah of Pittapur — Kumaraswami Sastri, J.

family to which the adoption is to be made and that where a sapinda refuses his consent on the ground that the widow was actuated by a desire to prevent the property from devolving on him and his heirs and that there was no necessity to adopt until he got a son, the refusal was not proper, and could be ignored by the widow. The learned Judges refer with approval to *Nagarampalli Kamesam* v. *Nagarampalli Batchamma.*[10] In that case it was held by Wallis and Sadasiva Aiyar, JJ., that where a nearest reversioner unreasonably refuses his consent to make the adoption the consent of remote reversioners is sufficient to validate the adoption.

In *Venkatarama Raju* v. *Papamma,*[11] it was held by Sankaran Nair and Spencer, JJ., that where a nearest sapinda refuses to give his consent on the ground that he would forfeit his right to proprty which he would otherwise get, the refusal of the sapinda was based on improper grounds and that an adoption made with the consent of the remoter sapindas was valid.

The position of the next sapindas whose consent is necessary is that they are by virtue of the relationship competent advisers of the widow and proper judges of the propriety of the act of the widow in making the adoption. Where a sapinda sets up an agreement between his father and the widow's husband which according to him prohibts an adoption even when such a contention has been set up by his father in a previous litigation and negatived and persists in this objection and where he says he is not going to give up his reversionary right to succeed by consenting to the adoption, it is difficult to see how he can be a competent judge of the propriety of the widow's act or a competent adviser. If the position of the sapindas is that of a domestic forum then the moment one of the judges takes up the grounds above mentioned as reason for the dissent he ceases to be one who could be a member of the forum and the widow is entitled to look to the consent of other sapindas.

It is clear from these authorities that the grounds of objection taken by the plaintiff for his refusal in Ex. EE-11 are personal to himself and based on consideration of his personal benefit and not proper grounds. The fact that he would lose the estate if an adoption was made and the fact that the boy chosen is a son of his enemy would not in my opinion render his grounds of objection proper. It is not suggested, as I said before, that there was anything in the boy rendering him unfit to be adopted to the Gollaprolu branch. The statement that Ramakrishna got some money has not been pressed before us and it is untenable on the evidence. The ground that the 1st defendant was precluded by her husband from making an adoption by reason of the arrangement between the plaintiff's father and the 1st defendant's husband is untenable and was so held in his father's suit. Both the

---

10. (1914) M.W.N. 629.
11. (1916) I.L.R. 39 Mad. 77: 27 M.L.J. 638.

trial Judge and Krishnan and Venkatasubba Rao, JJ., in appeal held that there was no agreement which would preclude the 1st defendant from adopting by reason of an implied prohibition from her husband. The reason given that Ramakrishna being an adopted son had no power to authorize an adoption is equally untenable. Although under Hindu Law Ramakrishna might have a lesser share in his adoptive father's estate because of the birth of a natural son if the property was partible, so far as the Gollaprolu estate is concerned where succession is to collaterals, both Ramakrishna and the plaintiff stand on equal footing and they get equal shares. No authority has been cited for the proposition that where there are sapindas of equal degree and who share equally in the estate of another sapinda but for an adoption, there is any difference between such reversioners as regards their capacity to consent to an adoption.

The only ground in the letter Ex. EE-11 which could possibly be urged as being a proper ground for refusal is ground 4. I have already given my reasons for holding that the reasons given in ground 4 are not correct. I have little doubt on the evidence and from the conduct of the plaintiff that he would not have given his assent to the adoption because his dominant idea was to get the estate. Ramakrishna when he wrote the letter Ex. XVI-(*a*) 15 days before the adoption was ill and as a matter of fact died about three months after the adoption. The plaintiff who was then a young man had every reason to think that he would be the sole reversioner on the death of the Rani. At any rate he would have been entitled to half of the estate. His contention was that the widow had no power to adopt because her husband had by virtue of an agreemeent between himself and the late Raja impliedly forbidden any adoption. The objection to the adoption went to the root of the title of the 1st defendant to adopt and had nothing to do with any discretion that he was exercising properly or improperly.

As regards the statement that the widow ought to have seen him personally, I do not see why she was under any necessity to do so especially as he admits that there was nothing improper in the letter asking for consent (Ex. EE-9).

It was argued that the refusal was only tentative and that if she had gone and persuaded him he might have changed his mind. But it is clear from the closing portion of the letter "it is therefore not possible to give you consent as desired in your letter" that the matter was conclusive leaving no door open. He no doubt says "if you had come to me and convinced me, I might have consented." But it is difficult to see how a person who took the grounds as he did in Ex. EE-11 would have been convinced of the propriety of the adoption.

The plaintiff's main grounds were that he would lose the estate, that his enemy's son was being adopted and that the widow

Sri Krishnayya Rao v. Rajah of Pittapur — Kumaraswami Sastri, J.

had no power to adopt. It is argued that he was actuated by the consideration that the inheritance should not be cut up and the widow should not deprive the adopted son of any share in the estate and that the plaintiff was justified in refusing to give his consent. I doubt very much whether the motive to benefit his enemy's son at the expense of the widow would ever have influenced him. Even assuming that there was no arrangement as regards giving one-half of the estate to the widow, it is clear from his letter that he would have refused his consent. His admissions in cross-examination make this clear.

"Q.—As you are on inimical terms with Ramakrishnayya would you be prepared under any circumstances to consent to the adoption of his son?

A.—I would object to it on the ground that he belongs to a family which has all along been denying my legitimacy. But if the 1st defendant had come and consulted me properly in person I do not know what I would have said.

Q.—Would anything she might say induce you to forget the enmity?

A.—I cannot say what I would have done if she had come and discussed with me.

Q.—Can you mention any circumstances which will induce you to forget the enmity?

A.—I am not able to think of any now."

As regards the loss which he refers to in paragraph 1 of his letter Ex. EE-11, he says that it is the prejudice to his reversionary right.

Though in the letter Ex. EE-11 the plaintiff says that Ramakrishna conspired with the widow and his brothers and received a bribe for giving his son in adoption he states in paragraph 10 of the plaint as a ground for the invalidity of the adoption that Ramakrishna was too ill and was not mentally or physically able to give his consent. Both the trial Judge and Krishnan and Venkatasubba Rao, JJ., have held that Ramakrishna was mentally and physically able to give his consent to the adoption and to take part in the ceremony of giving. I do not think on the evidence on record it can be held that Ramakrishna was incapable of either giving his consent or giving the boy in adoption.

Reference has been made to the evidence of Major Niblock. But Major Niblock says that he attended on Ramakrishna on the 13th of February and subsequently. The negotiations for the adoption took place long before. The evidence of Mr. P. V. Krishnaswami Chetti shows that Ramakrishna was quite capable of exercising his discretion. I see no grounds to disbelieve the evidence of this very respectable witness.

As regards the actual part taken by Ramakrishna on the 15th February the date of the adoption, it simply consisted in handing

Sri Krishnayya Rao v. Rajah of Pittapur. — Kumaraswami Sastri, J.

over the boy to the 1st defendant. It is not suggested that any ceremonies had to be performed by Ramakrishna beyond handing over and there is nothing in Major Niblock's evidence to show that he could not have done this.

I am of opinion that the plaintiff's refusal to give his consent was influenced by purely personal motives.

I have already given my reasons for holding that the adoption was not merely a device for dividing the estate between the 1st defendant and the adopted son, and that the adoption was not made for the purpose of enabling the 1st defendant to raise money to help her brothers in purchasing the Yoratla estate but that the debts to discharge which half the estate was given were her debts contracted by her either personally or by her brothers and nephew at her request. I am of opinion that the plaintiff's withholding his consent was not justified.

The only next reversioner was Ramakrishna. There is no authority for holding that the fact that his son was going to be adopted would render him incapable of giving his consent. On this point both the trial Judge and Justices Krishnan and Venkatasubba Rao on appeal agree.

In *Venkammal* v. *Namasivaya Chettiar* [12] there was only one sapinda whose boy was adopted and it was held that his consent was sufficient to validate the adoption. This case was decided so long ago as 1896. In *Parasara Bhattar* v. *Ranga Bhattar* [7] there were only two reversioners and the assent of one of them was held to be sufficient when the other refused consent on grounds which were improper. So far as I am aware, the validity of the consent of a sapinda whose son is adopted has never been doubted.

I agree with Venkatasubba Rao, J., in holding that the adoption of the 2nd defendant by the 1st defendant is valid. I would allow the appeal and dismiss the suit with costs throughout.

However, as my learned brothers Odgers, J., and Jackson, J., have taken the opposite view the appeal will under section 98, Civil Procedure Code, be dismissed with costs.

Odgers, J.

Odgers, J.—I regret to be unable to agree. I pronounce my own view of this case with some diffidence.

This Letters Patent Appeal comes to us in consequence of a difference of opinion between the late Mr. Justice Krishnan and Mr. Justice Venkatasubba Rao. The suit, O. S. No. 34 of 1919 on the file of the District Judge of Godavari, was filed by the plaintiff for a declaration that the adoption of the 2nd defendant by the first was invalid and not binding on the plaintiff and that it does not affect his rights either as reversioner under the Hindu

7. (1880) I.L.R. 2 Mad. 202. 12 (1895) 6 M.L.J. 34.

Sri Krishnayya Rao v. Rajah of Pittapur. —— Odgers, J.

Law or as the Zamindar of Pittapur entitled to a vested reversion in the Gollaprole estate on the death of the 1st defendant.

Two main questions were raised for decision on the pleadings: (1) as to whether the plaintiff is the legitimate or aurasa son of Rajah Gangadhara Rama Rao, and (2) whether the adoption of the 2nd defendant by the 1st defendant is true and valid. The decision of the first of these questions depends on the admissibility in evidence of certain documents tendered in evidence by the defendant in the Court of the District Judge. This will be dealt with at the end of the judgment. The main contention be fore us has been on the second issue affecting the adoption of the 2nd defendant by the 1st defendant.

The genealogical tree set out in the judgment of Mr. Justice Krishnan has been accepted as correct and frequently referred to in the course of the argument. It will therefore be convenient to set it out here in order to show the relationship of the persons concerned.

[For the genealogical table, *see* p. 896.—Rep.]

Rajah Gangadhara Rama Rao (No. 6) who was born in 1844 and died in 1890 adopted No. 11 Ramakrishna in 1873. He died in April 1914. No. 6 who is referred to as the old Raja is said to have had a son, the plaintiff, in 1885 by his wife Mangayamma. A younger brother of the late Raja, Venkat Rao (No. 8) died on the 4th November 1871 leaving no issue but two widows Venkayamma who died in 1889 and the 1st defendant Ramayamma. This lady in 1914 purported to adopt Sri Krishna (No. 16), the 2nd defendant, and it is this adoption that is now in question. In order that the facts may be clear it will be necessary to go back a little into the history of this matter. The old Raja (No. 6) on the 8th December 1869 by Ex. O granted to his younger brother (No. 8) the Gollaprole estate in lieu of maintenance. That is admitted to be an absolute estate to which the widows of Venkat Rao succeeded on his death in 1871. It would also be heritable by collaterals. After the death of Venkayamma, the old Raja brought a suit (O.S. No. 12 of 1889) to recover half the Gollaprole estate from the 1st defendant. His suit was dismissed in 1891 so that from 1891 the 1st defendant Ramayamma was in sole possession of the Gollaprole estate. On the 1st August 1886 the 1st defendant purported to make an adoption to her late husband No. 8. The old Raja brought Suit No. 30 of 1886 to set aside that adoption. The 1st defendant set up a will in her favour with authority to adopt from her husband. This was decided against her as it was held in effect that the will was a forgery and the adoption was bad. In 1890 the old Raja died and in November 1891 a suit was brought by No. 11 Ramakrishna, O.S. No. 6 of 1891, against the plaintiff impugning the legitimacy of his birth which was found to be illegitimate by the District Judge (Mr. Mackenzie). The High Court decreed in favour of the plaintiff on the ground that he was a

Sri Krishnayya Rao v. Rajah of Pittapur. Odgers, J.

persona designata under the will of No. 6 and that it was unnecessary to decide the question of the plaintiff's legitimacy. Their Lordships of the Privy Council in February 1899 took the same view. So up to the present time the only decision on this question of legitimacy is Mr. Mackenzie's judgment. In 1905 the plaintiff No. 12 married and it is said that from that time up to early in 1914 the relations between himself and Ramayamma were extremely cordial. In October 1906 the plaintiff assumed charge of his estate from the Court of Wards. On the 15th February 1914 the 1st defendant made a second adoption to her husband Venkat Rao No. 8, taking in adoption No. 16 the 2nd defendant and this is the adoption now impugned by the plaintiff. The 1st defendant died *pendente lite* and the 3rd defendant her sister's son is brought on as her representative.

In this case it is not contended that the 1st defendant possesses any authority to adopt from her late husband Venkat Rao which the widow set up in the former case, but her authority is founded on the consent of sapindas; nor is the factum of adoption now disputed. It was contended before the District Judge that Ramakrishna, No. 11, the father of No. 16, who is alleged to have given his consent to the adoption of his son by the 1st defendant was not in such a state of health or mind to enable him to validly take part in the ceremony of adoption on the 15th February 1914. There is no doubt a good deal of medical evidence including that of Lieutenant-Colonel W. J. Niblock, I.M.S., as to Ramakrishna's state of mind and body. He certainly appears to have been a very feeble old gentleman suffering from paralysis and probably pthisis also. It is unnecessary however to pursue this topic further since there has been no real contention before us that the factum of adoption is not proved. The question remaining then is as to its validity.

It has been established in this province since the Ramnad case in *The Collector of Madura* v. *Muthuramalinga Sethupathi*[6] that a widow may by custom adopt with the consent of her husband's sapindas. Their Lordships say in that case that it is not the consent of every kinsman, however remote, that is essential but that their assent seems to be required by reason of the presumed incapacity of the woman for independence and they continue, "All that can be said is that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bona fide* performance of a religious duty and neither capriciously nor from a corrupt motive." This was affirmed in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*[13] in which the Privy Council said:

"It may be the duty of a Court of Justice administering the Hindu Law, to consider the religious duty of adopting a son as the essential

6. (1868) 12 M.I.A. 397.
13. (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.).

Sri Krishnayya Rao v. Rajah of Pittapur. Odgers, J.

foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman, subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of, or capable of exercising dominion over, property. It seems, therefore, to be the duty of the Courts to keep the power strictly within the limits which the law has assigned to it."

This seems to be the first expression of opinion that the rights of property must be considered even though it is the duty of the Courts to investigate the reasons of an adoption from a religious standpoint. The Ramnad case was explained in the Guntur case in *Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi*,[14] in which their Lordships say that they consider it dangerous to introduce considerations of the particular motives operating on the mind of the widow and that what the committee in the Ramnad case meant to lay down was that the assent of the sapindas should be sufficient "to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat the interest of this or that sapinda, but upon a fair consideration, by what may be called a family council, of the expediency of substituting an heir by adoption to the deceased husband." To this must be added *Venkatakrishnamma* v. *Annapurnamma*[8] of this Court that the consent of the majority of sapindas will suffice. In *Veerabasavaraju* v. *Balasurya Prasada Rao*[5] the Privy Council affirmed the validity of an adoption made with the consent of sapindas but laid down that the consent of remote sapindas without asking for the consent of the nearest is ineffectual and that it is immaterial if the widow knew that the nearest sapinda, if consulted would have refused his consent and in *Kristnayya* v. *Lakshmipathi*,[15] the Privy Council quoted the passage from *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*,[13] set out above and stated that the consent required is that of a substantial majority of those agnates nearest in relationship who are capable of forming an intelligent and honest judgment in the matter and that save in exceptional cases the consent of the nearest sapindas must be asked, and if not asked, it is no excuse to say that they would have refused.

The 1st defendant accordingly consulted No. 11 Ramakrishna, the father of the boy she designed to adopt, and No. 12 the plaintiff. As to how exactly she consulted them will be explained later

5 (1918) L.R. 45 I.A. 265: I.L.R. 41 Mad 998: 36 M.L.J. 40 (P.C).
8 (1900) I.L.R. 23 Mad 486
13 (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C.)
14. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad 174 (P.C.)
15. (1920) L.R. 47 I.A. 99: I.L.R. 43 Mad. 650: 39 M.L.J. 70 (P.C).

Sri Krishnayya Rao v. Rajah of Pittapur.

Odgers, J.

on. Of these Ramakrishna No. 11 consented and the plaintiff No. 12 refused. There is therefore *prima facie* no majority of the nearest sapindas such as is required by the decision in the Privy Council in *Kristnayya* v. *Lakshmipathi*,[13] though, I imagine, that if for any reason we are entitled to disregard the dissent of the plaintiff it would be difficult to hold the adoption invalid on the ground that there is only subsisting the consent of Ramakrishna himself. There is one passage in the judgment of the Privy Council in *Sri Virada Pratapa Raghunada Deo* v. *Sri Brozo Kishoro Patta Deo*,[15] at page 82, which might possibly be taken to imply that the consent of the natural father of the boy to be adopted when he is a near sapinda stands on a somewhat lower plane from the consents of other near sapindas. I am however doubtful if their Lordships really meant to make any such distinction. It is therefore necessary in this case to canvass the refusal of consent to this adoption on the part of the plaintiff, for, if we are satisfied that the plaintiff withheld his consent from personal or malicious or other improper motive, we should, on the case-law which will be cited on the point hereafter, be justified in excluding his refusal and we should therefore be left with the consent of Ramakrishna. If, on the other hand, the plaintiff was justified in refusing his consent there is clearly no majority of consents as required by law and the adoption must be declared invalid. There is another possible line of enquiry and that is into the motives which actuated the widow, the 1st defendant. This is no doubt an enquiry of some nicety as the Privy Council has said and there is, I think, no case which has declared invalid an adoption depending directly on the motives of the widow alone unless those motives amount to a desire to adopt for the sole purpose of practically dividing the estate with the person to be adopted. As pointed out by Mr. Justice Krishnan though there is authority in Bombay which will hereafter be referred to for holding that a corrupt motive in the widow may be insufficient to invalidate the adoption though it may render a corrupt bargain ineffectual, the position is different when we are considering the question whether there is sufficient evidence of assent on the part of the kinsmen to support an adoption as in the present case. Mr. Justice Krishnan held that there was no such assent and that this adoption must therefore be declared invalid. Mr. Justice Venkatasubba Rao held that there was such sufficient assent as the plaintiff's refusal was bad and must be discarded on the ground that he had refused by reason of grounds personal to himself. I proceed therefore first to deal with this question of the consent of the sapindas. It may be said in passing that it was faintly argued that even if the plaintiff's dissent was found to be valid there was a consent by a remoter sapinda, one of the younger sons of Ramakrishna

---

13 (1876) L.R. 3 I.A. 154: I.L.R. 1 Mad. 69 (P.C)
15 (1920) L.R. 47 I.A. 99: I.L.R. 43 Mad. 650: 39 M.L.J. 70 (P.C.)

Sri Krishnayya Rao v. Rajah of Pittapur.

Odgers, J

which combined with Ramakrishna's assent would amount to a majority. Next after the plaintiff the senior sapinda is undoubtedly Ramakrishna's elder son Gangadhara Rama Rao. His consent was admittedly not asked. So there is nothing in this point.

It is not quite clear when the decision to adopt the 2nd defendant was taken by the 1st defendant. Some of the witnesses, *e.g.*, D.W. 1 and D.W. 8 (who is the 1st defendant), say that she wished to adopt the 2nd defendant about a year before the adoption was made as she fell ill. Mr. P. V. Krishnaswami Chetty (D.W. 9) now deceased who was a vakil of this Court and in extensive chamber practice said he was consulted about two months before the adoption by D.W. 27 and D.W. 1. He seems to have been consulted in order to get the consent of Ramakrishna who is said to have been objecting, through the Rajah of Venkatagiri, the brother of Ramakrishna, whose adviser he (Mr. Chettiar) was. 3 or 4 weeks before the adoption Ramakrishna himself interviewed Mr. Chettiar on the subject of this adoption. The formal letter asking for the consent of Ramakrishna to adopt and also for permission to adopt his fourth son, the 2nd defendant, is dated 27th January, 1914 (Ex. XV). One phrase in the letter is possibly important. "So, as I have to adopt with the permission of the sapindas, I write this letter, etc." Ramakrishna replied on the 30th January giving his consent to both the requests of the 1st defendant. 1st defendant then approached the plaintiff whom she addresses as the "Zemindar of Pittapur." (Ex. EE-9). It recites that she is anxious to adopt for securing a good end to her late husband, performing his ceremonies, etc., and perpetuating the progeny. It also recites that it had been previously decided that she had no authority from her husband to adopt and concludes "I therefore write this letter to you earnestly requesting your permission for me to adopt the said boy." It will be observed that there is no reference in the letter to the plaintiff being a sapinda, and we find from the evidence that the letter was written under legal advice owing to the fact that it might some day turn out that the legitimacy of the plaintiff was formally established. In the meantime the 1st defendant was obviously unwilling to address him in any way which might show that she admitted his legitimacy. There was no reply to this letter and it may be mentioned in passing that the 1st defendant came to Madras in anticipation of the adoption ceremony on the 4th February. From Madras she wrote a reminder to the plaintiff (Ex. EE-10) on the 7th February. On the 11th the plaintiff sent a reply Ex. EE-11 in which he sets out seven reasons for refusing. The letter seems to be very important and in fact it is the point on which in my opinion the decision of this case turns. I therefore set it out at length:—

"(1) I have come to know that you are not adopting with an honest purpose either for the spiritual salvation of your deceased husband or for the perpetuation of his line but bearing spite against me for my not render-

Sri Krishnayya Rao v. Rajah of Pittapur. Odgers, J.

ing pecuniary help to your brothers as requested by them and you and with a view to put me to loss and for the selfish gain of all of you, you have intrigued with Rajah Rao Venkata Surya Mahipathi Ramakrishna Rao Bahadur Garu who has been my long-standing enemy and arranged to adopt his son."

"(2) That you have resolved upon making the adoption with the motive mentioned in paragraph 1 *supra* and have not applied for my consent with an honest mind will be evident from the very fact that, instead of asking for permission to adopt a suitable boy, you wrote to me to say that you wanted to take in adoption the fourth son of Sri Rajah Rao Venkata Surya Mahipathi Ramakrishna Rao Bahadur Garu and were very desirous of having my consent for the same."

"(3) Had you come to me and told me the necessity that has arisen for you to make an adoption and the reasons for adopting that boy, I would have been in a position to discuss with you about it in person and express my opinion to you."

"(4) You, your brothers and Sri Rajah Rao Venkata Surya Mahipathi Ramakrishna Rao Bahadur Garu having joined hands in the manner set forth above in order to put me to loss, you and your brothers having made some arrangements for yourselves, as consideration for your agreeing to adopt his son to make an adoption, and having thus decided upon the arrangements, you and your brothers went to Madras and being bent upon adopting that boy, you wrote to me the letter merely for the sake of formality and not with an honest desire to obtain my consent."

"(5) In pursuance of the arrangement that was made by your late husband and my father, the late Sri Rajah Rao Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu, you were precluded by your husband from making an adoption."

"(6) The consent given by Sri Rajah Rao Venkata Surya Mahipathi Ramakrishna Bahadur Garu, for his own gain, to your adopting his son is not valid."

"(7) Further, I being the aurasa son, Sri Rajah Rao Venkata Surya Mahipathi Ramakrishna Rao Bahadur Garu, who is an adopted son, has no authority to give the consent. It is therefore not possible to give you consent as desired in your letter."

As stated, the adoption took place on the 15th February 1914 and was evidenced by an adoption deed Ex. XVI, attested by several respectable witnesses. The day after, on the 16th, what has been called a settlement deed, Ex. XVII, was executed by the now adopted son to the 1st defendant giving her one-half of the Gollaprole estate. This is another important document and I therefore reproduce the essential portion of it.

"So, we settle and confer on you, by means of this document, one-half of the Gollaprole estate, described in the schedule hereunto annexed and situate in Pittapuram Sub-division, Godavari District, and worth about one lakh of rupees, for liquidation of your debts and for meeting the expenses of your pilgrimage, etc.; you may therefore enjoy the said one-half estate undisputedly with rights of gift, sale, etc. As per agreement entered into between both of us regarding my conveyance to you of the said property as aforesaid

Sri Krishnayya Rao v. Rajah of Pittapur.

Odgers, J.

you shall yourself liquidate your debts and we shall have no concern therein." On the same date, a maintenance deed Ex. XVII (a) was executed by the adopted son to the 1st defendant charging his half of the Gollaprole estate with the payment of Rs. 500 a month as 1st defendant's maintenance.

The first and very important consideration is whether these settlement and maintenance deeds were the consideration for which the adoption was made. The evidence is that up to December 1913 the plaintiff and the 1st defendant were on friendly, almost affectionate terms. The plaintiff details various attentions and kindnesses paid to his family by the 1st defendant. These are commented on by the learned District Judge in paras. 62 and 63 of his judgment and there is no reason to believe that this state of things did not exist, although it is now said by the 1st defendant that they were all pretence on her part and that she only acted as she did in order to avoid making an open enemy of the plaintiff. I am not prepared to believe this. She had been since 1891 in sole possession of the Gollaprole estate. She kept house with her two brothers and sister's son at Undoor. One of them is D.W. 27, her brother Seetharamaswami, and D.W. 22, her brother's son Venkayya. Prakasa Rao, her sister's son, was not called. Although it is stated by D.W. 22 that the 1st defendant's accounts are kept separate from those of the family, it is very doubtful if, in view of the evidence of her brother, D.W. 27, that the 1st defendant had been bearing all the expenses of the family and had given them money and whatever they wanted, this statement can be relied on. D.W. 27 purchased the equity of redemption in the Voratla estate for a small sum and admittedly required 2 lakhs and a quarter to pay off the Zamindar of Tuni if he was to obtain the estate as seemed to have been his design in 1913. This witness denies that in June or July 1913 he asked Mr. Seetharamayya, acting Dewan of Pittapur, to intercede with the plaintiff to get him a large sum of money for this purpose. He says also that he never asked Mr. Subbarayudu, the Dewan, for financial assistance for redeeming the Voratla estate or discharging his debts. On the other hand, Mr. Seetharamayya (P.W. 111) who was Dewan of Pittapur from 1910 to 1913 distinctly says that D.W. 27 came 3 or 4 months before his term of Dewan expired (which would be in May or June 1913) to ask him to suggest to the Raja that the latter should make a gift of Rs. 2 or 2¼ lakhs to him. The witness adds that he (Seetharamaswami) wanted that money to clear some heavy debt in connection with some estate trouble with the Tuni Raja. It seems to me there is no reason to doubt the words of this retired Deputy Collector. Further the plaintiff received certain requests for money in a rather curious form, namely, *rukkas,* or anonymous letters enclosed in signed letters the object being, I presume, that they can be taken away and dealt with separately and are not necessarily disclosed to any

Sri Krishnayya Rao v. Rajah of Pittapur.

Odgers, J.

one reading the main letter. There are a number of these addressed to Chiranjeevi Rajah Babu of which one Ex. EE is said to have been written in May or June 1913. These *rukkas* are identified by the dates on the covers or on the letters in which they are enclosed. Ex. EE-2 is signed by the 1st defendant and runs as follows: "If you are willing to render the help asked for by my younger brothers, etc., and if you permit, they will come and explain to you the *pros* and *cons* (situation) and settle Voratla affair. It is after receiving your order that they will give up, or take up Voratla estate. As Voratla estate has got to be settled at once, please consider and reply immediately." Ex. EE-3 is a letter signed by the 1st defendant, dated 9th December 1913, and addressed to the plaintiff and enquiring as to the welfare of plaintiff's family. With this is said to have been enclosed Ex. EE-5 complaining that the (plaintiff) has not replied to the 1st defendant's two requests for help for her brothers. If the plaintiff's help cannot be obtained the brothers will give up the Voratla estate. Ex. EE-6 is a signed letter from the 1st defendant blessing the plaintiff and calling him "my son" and asking after the welfare of his wife and children. With that was enclosed Ex. EE-8 another request for an answer as to whether the brothers can expect financial help from the plaintiff. The date of this is said to be 3rd January 1914. I may add that Mr. Grant for the appellant did not seriously contend that these *rukkas* were not genuine as was contended before the District Judge or that they did not emanate from the 1st defendant. The plaintiff (p. 760) gives evidence as to these requests for pecuniary help and also with regard to these Ex. EE series of letters and *rukkas*. He had one personal talk with the 1st defendant about this monetary assistance when he was on his way from Pittapur to Madras which was in November 1913. The 1st defendant accompanied the plaintiff as far as Samalkot and observed that it was an occasion when all should be happy as the plaintiff had just had a second son born. She said "they are happy and you must also make me happy. Please do not forget about my request to you." The request was to help her brothers and nephews with money. Besides this evidence of the need of money on the part of the 1st defendant's relations, reference may be made to the following evidence and findings by the District Judge. Although D.W. 27 asserts that he had money on hand for the purpose of redeeming the Voratla estate and although he says his accounts will show the state of his finances, none of these accounts have been filed by him as nobody told him that they were necessary. It is quite obvious from the evidence of this witness (pages 650 to 652) that the amount of the family indebtedness was very considerable. It is said on behalf of the appellant that all they had to do was to combat the suggestion that money was wanted to redeem the Voratla estate when as a matter of fact it was not used for that purpose.

Sri Krishnayya Rao v. Rajah of Pittapur. — Odgers, J.

This may be at once admitted and the reason may be found in the evidence of this witness, that instead of being able to acquire it for about Rs. 2¼ lakhs a decree was ultimately passed on the mortgage for Rs. 7 lakhs and odd. There is further the evidence that although the money obtained on mortgage of the half share of the Gollaprole estate retained by the 1st defendant was not utilized for the purpose of redeeming the Voratla estate, it was utilized in payment of the debts of this family. These are said to have been paid by Kuppiah, D.W. 1 (page 424). He says "no list of the 1st defendant's debts was given to me before the mortgage bond. There is no writing to show that I paid the moneys and discharged those debts." Without preparing a list he made over all the discharged documents to the Raja of Venkatagiri. The latter's Khajangi (treasurer) D.W. 28 denies that any such documents were received in the Raja's treasury. The District Judge in paras. 105 and 107 comes to the conclusion that the 1st defendant's brothers did require money to the extent of over Rs. 2 lakhs in 1913. The ancestral property of the family seems originally to have yielded about Rs. 400 a year. After the settlement it yielded Rs. 40,000 a year. The same witness D.W. 27 giving evidence in 1887 in O.S. No. 3 of 1887, Ex. HHHHH puts the family property at that date at about Rs. 3,000 capital value. D.W. 22 also speaks about the family debts. He of course would say that the debts of the 1st defendant were discharged by the loan raised from the Raja of Venkatagiri. He can give no details of the debts amounting to Rs. 40,000 or Rs. 50,000 that were existing at the time of the 2nd defendant's adoption. I agree with the learned District Judge that these two witnesses practically admitted that what they called the 1st defendant's debts were really borrowed for their own family purposes and the bonds for them were executed by these two witnesses. It is, on the probabilities as well as on the actual evidence, extremely unlikely that the 1st defendant had any serious amount of debt of her own. It may be remarked that any debts she had were of course not binding on the estate and the reversion and there is no explanation of her alleged desire to clear off her own debts by the arrangement that she entered into. In this connection, it may be mentioned that the 2nd defendant admits that the amount of debt was not mentioned to him nor was the value of the half share of the estate which it was arranged that he should keep. It is also noteworthy that the 1st defendant admits that in Exhibit XVIII the mortgage executed to the Raja of Venkatagiri in July 1914, the debts are described "as our debts" and lands belonging to the brothers of the 1st defendant were also included in the mortgage. This seems to me to put the question beyond doubt.

With regard to the terms of the settlement, these, it will be remembered, are alleged to have been arranged subsequent to the adoption, in order to counter the suggestion, that the terms were

Sri Krishnayya Rao v. Rajah of Pittapur. —— Odgers, J.

the condition on which the adoption was made. P.W. 113, Narasinga Rao says distinctly that these terms were a condition precedent to the adoption. There is, however, some reason to suspect his evidence. Mr. Justice Krishnan apparently does not rely on it, and Mr. Justice Venkatasubba Rao definitely says it is untrustworthy. I am therefore prepared to leave it aside altogether. When speaking of "terms" I allude to the division of the estate between the 1st defendant and the 2nd defendant and to the maintenance arranged for the 1st defendant and to the marriage arranged for the 2nd defendant after his adoption when it was settled that he should marry D.W. 27's daughter, *i.e.*, 1st defendant's niece or brother's daughter. It is said that as the refusal of the plaintiff to advance money for the purpose of helping the 1st defendant's family was not until the 11th February 1914, that refusal can have had no effect on the 1st defendant's mind with regard to this adoption which some of the witnesses say was settled by her a month or more before the actual ceremony on the 15th February. This does not seem to me conclusive for after receiving no reply from the plaintiff for some time to her requests for money and particularly having failed to obtain a satisfactory reply at her interview in November 1913 already mentioned, she may quite well have made up her mind after that time to adopt in order to spite the plaintiff. It is a very curious thing if it is the fact, that the 1st defendant set out from Undoor to Madras for this adoption ceremony as she did on the 4th February (and it must be remembered that the adoption was originally fixed for the 8th) without any of these terms settled or even suggested. According to the 1st defendant she suggested to the 2nd defendant that he should take the whole estate and discharge her debts. He said he would take half and that the 1st defendant might retain half for the purpose of discharging these debts. Although the 1st defendant would make it appear that this conversation with the 2nd defendant took place after she came to Madras, the 2nd defendant on the other hand denies that he had any conversation with the 1st after she came to Madras and before the adoption took place. On the other hand, the 1st defendant had two interviews with Ramakrishna in Madras and I think there can be no doubt that the terms were in fact arranged between Ramakrishna and the 1st defendant. D.W. 1 was asked by the 1st defendant to speak to Ramakrishna about the terms. Ramakrishna replied that the boy should be consulted as he was a major. The words of this witness D.W. 1 Kuppiah as to these terms are somewhat significant: "The 1st defendant said that in case of the adoption half the estate should be given to her to liquidate her debts which amounted to 2 lakhs or that the adopted son should take the whole estate and discharge these debts." The boy said that he would give away half the estate in order that the 1st defendant might pay her debts and he would be content with the other half. The 1st defendant accepted this proposal. The 1st

Sri Krishnayya Rao v. Rajah of Pittapur. — Odgers J.

defendant (as D.W. 8) herself says, "At the time of the adoption I made arrangements for the discharge of these debts." And the 2nd defendant D.W. 49 puts it even more plainly that D.W. 1 came to him and told him (the witness) that the 1st defendant had informed Ramakrishna that she wished to adopt him (the witness) "on condition of my taking the whole estate and discharging her debts myself." Ramakrishna however sent word through D.W. 1 to ask if he was willing. The witness replied that it would be better if he were given half the estate free of debts. It is true that when the deposition was read over to the witness he tried to go back on this statement (page 155). The learned District Judge however notes that the witness clearly stated in the manner recorded in the deposition.

Another noteworthy feature is that although Mr. Krishnaswami Chetty was consulted and drafted the adoption deed he heard no word about these arrangements till five or six days before the adoption as regards the settlement and heard nothing of the marriage till after the adoption. He never saw the draft of the settlement deed, nor was any question of the discharge of debts put before him before the adoption. Mr. Krishnaswami Chetty's evidence has been canvassed for the respondent at some length chiefly on the ground of certain alleged inaccuracies about the mental or physical condition of Ramakrishna either at the ceremony or at the interview that he had at Mr. Chettiar's house. The witness may be inaccurate in some medical details or even positively wrong, but I do not see any reason on this account to reject his evidence in the main. If then the settlement and the other arrangements were all perfectly legal and there was nothing to hide why did not Mr. Krishnaswami Chettiar know about them? We have the fact that the stamps for these deeds, adoption, settlement and maintenance, were all purchased on the same day, namely the 6th February, and taking the evidence as a whole I think it is impossible to escape from the conclusion arrived at by Mr. Justice Krishnan that "it is too much to ask one to believe that the settlement and maintenance arrangements had no intrinsic connexion with the adoption." We have seen the 1st defendant's keen desire to raise money for her brothers from the plaintiff which ended in failure. Nothing is more likely than that, having failed in this respect, she should entertain the idea of adopting this boy, the son of Ramakrishna, the sworn enemy of the plaintiff and of dividing the Gollaprole estate with him and thereby defeat the plaintiff's reversionary right as to that half. If that is so, these arrangements were conditions to the adoption and by that I mean that but for such arrangements the adoption would not have been made. We are asked to consider that the 1st defendant had been ill since about 1912 of which there is very little evidence and that, as an old lady of 63 or 64, she felt that her days were numbered and that she was actuated by a desire for her husband's salvation and to perpetuate

Sri Krishnayya Rao v. Rajah of Pittapur. —— Odgers, J.

his line. I am bound to say that in my view this is difficult to believe in the case of this lady who waited 15 years from 1871 to 1886 to attempt to adopt to her husband and then produced a forged authority and waited another 28 years in order to attempt the same thing. As in the case of a surrender by a widow to a reversioner, so in an adoption, the operation must not be a mere device to divide the estate with the reversioner. *Rangasami Goundan* v. *Nachiappa Goundan.*[16] It is however said on the authority of certain cases to be referred to that the widow's motives cannot be canvassed and that there is a presumption that the widow has performed her duty from proper motives. The onus lies heavily on him who seeks to set aside the adoption on the ground of corrupt motive. *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal.*[17] Further in *Mahableshwar* v. *Durgabai*[4] it was held that if the motives of a widow are of a mixed character the presumption that she performed the ceremony from proper motives is not rebutted and the adoption is not invalid if the ceremony has been proved to have been performed from corrupt motives, *e.g.*, terms arranged between the adopter and the father of the adoptee. In that case the District Judge did not find that the widow had not the spiritual benefit of her deceased husband in view when she made the adoption. It must be remembered that in Bombay a widow may adopt provided she is not prohibited expressly or impliedly by her husband himself from doing so. There is no such thing there as an adoption with the consent of sapindas and the Full Bench of the Bombay High Court that considered the matter of the widow's motive in *Ramachandra Bhagavan* v. *Mulji Nanabhai*[3] held that any discussion of her motive was irrelevant. Parsons, J., observes that such enquiry would be irrelevant because the action of the widow is that of a person who does what she has the right to do, but where she has not this full power but is obliged to obtain the consent of other persons to her action, the case is very different. He therefore held that the language of the Privy Council in the *Ramnad Case* was inapplicable to the case of a widow who had in herself full and free power to adopt. Ranade, J., also stresses this distinction and notes that the "*Ramnad Case* came from the province of Madras where the restrictions on the widow's choice are more strictly enforced." Fulton, J., observed "In Southern India, we know, on the authority of the *Ramnad Case* that the assent of kinsmen is held sufficient to evidence the correctness of the widow's motive. Here, however, no such settled rule prevails." Indeed it would seem that no such decision as that in the *Ramnad Case* would be possible in a matter of this kind arising in Western India. I am, therefore, prepared to hold that this adop-

3. (1898) I.L.R. 22 Bom. 558 (F.B).
4. (1898) I.L.R. 22 Bom 199.
16. (1919) L.R. 46 I.A. 72: I.L.R. 42 Mad. 523: 36 M.L.J. 493 (P.C).
17. (1891) I.L.R. 15 Bom. 565.

Sri Krishnayya Rao v. Rajah of Pittapur. —— Odgers, J.

tion is invalid because it was made with a corrupt motive, namely, the sole desire of dividing the inheritance with the adopted son. It has been pointed out more than once that secular motives very largely enter into this question, for instance in *Veerabasavaraju* v. *Balasurya Prasada Rao*[5] the Privy Council has set out a number of secular reasons which should guide the sapindas in considering a contemplated adoption, such as succession to the estate, its protection, and the introduction of a new co-parcener; and their Lordships refer to their decision in *Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi*,[14] which shows clearly that rights to property cannot be left out of consideration in the determination of the question. In fact Mr. Justice Ramesam in a recent case *Anne Brahmayya* v. *Chelasani Rattayya*[18] asserts that temporal considerations should have as much weight as spiritual in these cases referring with approval to the passage extracted above from *Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi*,[14] quoted together with a passage from Gulab Chandra Sastri's book that adoption is more a temporal than a spiritual institution. *Veerabasavaraju* v. *Balasurya Prasada Rao*[5] at pages 1010 and 1011. Under the circumstances set out it seems to me it is impossible to say that this widow was in truth actuated by any spiritual motive whatever. It is suggested that in this case we should hold that the conditions are bad or voidable, but that the adoption must stand, reliance being placed on *Bhasba Rabidat Singh* v. *Indar Kunwar*,[2] and the latest case of the Privy Council *Krishnamoorthi Aiyar* v. *Krishnamoorthi Aiyar*.[1] In the former the adoption was not fraudulent or corrupt and there were no conditions attached to the adoption, the alleged agreement with the natural father being that the widow should retain the whole estate for her life. It appears to me that that case is very different from the one before us, and I have already held that the terms were a condition on which the adoption in question took place. In the latter their Lordships while upholding an arrangement on an adoption whereby the widow was to enjoy the property during her lifetime or for a less period, that arrangement being consented to by the natural father before the adoption, as valid by custom, held that an agreement by the natural father is not effectual to validate any other disposition taking effect after the adoption. Where the adoption takes place before such an agreement, of course matters are different. It seems to me that this case is not affected by the decision in *Krishnamoorthi Aiyar* v. *Krishnamoorthi Aiyar*[1] because the settlement here preserves to the widow an absolute estate in a half, a state of things expressly referred to by their Lordships at the end of the judgment

1. (1927) L.R. 54 I.A. 248: I.L.R. 50 Mad. 508: 53 M.L.J. 57 (P.C.)
2. (1889) L.R. 16 I.A. 53: I.L.R. 16 Cal. 556 (P.C.).
5. (1918) L.R. 45 I.A. 265: I.L.R. 41 Mad. 998: 36 M.L.J. 40 (P.C.).
14. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad 174 (P.C.).
18. (1924) 20 L.W. 503.

Sri Krishnayya Rao v. Rajah of Pittapur. —— Odgers, J.

and for which they thought no custom has been proved to exist and that such arrangements are against the radical view of the Hindu Law. This would be enough to dispose of the appeal were it not that I think an equally strong case may be made on the refusal of the plaintiff to consent. It is said that the refusal is bad because it is based entirely on personal motives, that in the words of *Parasara Bhattar* v. *Ranga Bhattar*[7] the consent is refused from interested or improper motives or without a fair exercise of discretion. *Cf.* also *Nagarampalli Kamesam* v. *Nagarampalli Batchamma*[10] and *Venkatapathi* v. *Punnamma.*[9] The law has set up what may be called a domestic tribunal, namely, the sapindas, who are to judge as to the contemplated action of the widow in making the adoption. Their decision or at least their refusal, since there is some authority to the effect that an assent of a sapinda cannot be scrutinised (*Viswasundara Rao* v. *Somasundara Rao*[19] dissented from however in *Anne Brahmayya* v. *Chelasami Rattayya*[18]) is only to be canvassed if the refusal is obviously improper. I shall shortly take each of the seven points contained in Ex. EE-11.

No. 1. The plaintiff says he has come to know that the 1st defendant is not really actuated by any honest or spiritual purpose but from spite owing to his own refusal to advance money. The plaintiff's evidence is that he caused enquiries to be made through his Dewan who is now dead and from what has been said it appears that the plaintiff was justified in making these accusations. He then goes on to say that the adoption is being made "with a view to put me to loss and for the selfish gain of all of you." Now it is said that that is a pure personal ground and ought to be discounted. It only sets out, be it noted, the object or one of the objects with which the adoption is being undertaken and it seems to me that a sapinda is entitled to show that if the adoption is not undertaken with any honest or spiritual purpose, it is undertaken out of spite with a view to put him to loss and make a gain for the adopter since he is thereby merely amplifying or explaining his grounds for asserting that there is no honest purpose in the adoption.

No. 2. He objects to the boy.

No. 3. He points out that if the 1st defendant had come and seen him and convinced him of the necessity of adopting at all and the reasons for adopting Ramakrishna's son he would have been in a position to discuss the situation. It is said that this is unreasonable because the plaintiff in cross-examination could not suggest exactly on what lines the discussion would have proceeded. It seems to me

1. (1927) L.R. 54 I.A. 248: I.L.R. 50 Mad. 508: 53 M.L.J. 57 (P.C.).
7. (1880) I.L.R. 2 Mad. 202.
9. (1915) M.W.N. 236.
10. (1914) M.W.N. 620.
18. (1924) 20 L.W. 503.
19. (1920) I.L.R. 43 Mad. 876: 59 I.C. 609.

Sri Krishnayya Rao v. Rajah of Pittapur. — Odgers, J.

a reasonable request. Here is a lady up to a very short time before this date on close and affectionate terms with the plaintiff and his family suddenly turning round and proposing to adopt the son of Ramakrishna who had impugned in Court plaintiff's legitimacy. I think that point No. 3 is a fair, and as far as I can see, honest proposal.

As to No. 4, it alleges that D.W. 1 and her brothers and Ramakrishna have joined hands in order to put the plaintiff to loss, "You and your brothers having made some arrangements for yourselves as consideration for your agreeing to adopt his son." That I think is proved.

The next allegation is that Ramakrishna received a bribe for giving his consent. We have not been directed to any evidence as to this and the point was not argued.

The next complaint in the paragraph is that the letter (EE-9) was sent merely formally, that his consent was requested formally and with no honest desire to obtain his consent as a sapinda. As remarked above 1st defendant did not address him as a sapinda and she did not consult him as a sapinda and she had no idea of consulting him as a sapinda. In fact, one is rather led to the conclusion that she would not have consulted him at all had it not been for the advice of her lawyers that it might turn out that the plaintiff was really the aurasa son of the old Raja and that therefore it would be as well to consult him. There is some evidence that the 1st defendant had made up her mind to make this adoption whatever the plaintiff said. No reply was received till the 11th, that is to say, one week after she had set out from Undoor to Madras in order to be present at the adoption. The adoption was made in Madras. In Ex. EE-12, a letter sent to the plaintiff after the adoption on the 16th February 1914 she says she was advised that her asking for his permission was unnecessary, ridiculous and objectionable, that she nevertheless asked for the permission "regardless of the truth about it, fearing that you might, because of the wealth you have secured accomplish anything at any time." She also points out that as to the suggestion that she should have adopted a son of the plaintiff she was unwilling to adopt him "due to your suspicious *aurasathwam* (or parentage)." Venkayya (D.W. 22) in his evidence (page 87) says that the adoption of the 2nd defendant had been settled 10 or 15 days before the letter Ex. EE-9 was written. He also states that the 1st defendant decided to adopt the 2nd defendant whether the plaintiff consented to the adoption or not, and the 1st defendant admits that she did not apply to the plaintiff as sapinda but simply because he was an influential man and to save trouble (page 474). To the same effect is Ramayya's (D.W. 27) evidence that 1st defendant did not think plaintiff's consent was necessary but the vakil advised that his consent should be obtained.

Sri Krishnayya Rao v. Rajah of Pittapur. Odgers, J.

With regard to point No. 5, it is said that there was an agreement by Venkat Rao and the old Raja not to adopt. It is difficult to see how this could bind the 1st defendant and there is no doubt that that is a bad reason.

Point No. 6 alleges that the consent of Ramakrishna is invalid. This point as stated was strenuously contested before the District Judge but was not persisted in at either of the hearings in this Court.

No. 7 is also a bad reason, *viz.*, that Ramakrishna, the adopted son of the old Raja, had no power to give consent while the plaintiff as aurasa son is in existence.

I am therefore unable to say upon the best consideration that I can give to the terms of Ex. EE-11 that the plaintiff has refused his consent from dishonest or improper motives or without a fair exercise of discretion. Under the circumstances I think it was the duty of the plaintiff to refuse because it is the duty of the domestic tribunal, the sapindas, to see that the act done by the widow should be " in the proper and *bona fide* performance of a religious duty" as the Ramnad case says "and neither capriciously nor from a corrupt motive." This duty, though it has been explained, does not seem to me to have been abrogated, by the decision in *Vellanki Venkatakrishna Rao* v. *Vekata Rama Lakshmi.*[14] "There should be such proof of assent on the part of the sapindas as should be sufficient to support the inference that the adoption was made by the widow, not from capricious or corrupt motives, or in order to defeat this or that sapinda but upon a fair consideration of what may be called a family council of the expediency of substituting an heir by adoption to the deceased husband."

It appears to me that applying this as the test it is impossible to say that this adoption was *bona fide* made by the widow from a proper motive and that therefore the refusal of the plaintiff to assent to this proceeding was justified. If that is so, we have one consent and one refusal, and in my opinion there is no such majority of sapindas as is required by the Privy Council judgments above referred to. I do not think it was intended that whereof two sapindas—one consents and the other refuses you are merely to disregard the latter and say that as you have one consent that is enough to validate the adoption. I therefore agree with the conclusion of Mr. Justice Krishnan that there is here not such an assent of kinsmen as would support the adoption.

As to the point of legitimacy Mr. Grant for the appellant contends that the depositions in O.S. No. 6 of 1891 ought to have been received in evidence in this case in order to prove the illegitimacy of the plaintiff under section 33 of the Evidence Act on the ground that the old Maharaja is dead, Ramakrishna is dead, and that the

14. (1876) L.R. 4 I.A. 1: I.L.R. 1 Mad. 174 (P.C.).

S. Krishnayya Rao v. Rajah of Pittapur.

Odgers, J.

doctors who gave evidence in O.S. No. 6 of 1891 and to whom certain admissions are said to have been made are also dead. It will be remembered that in O. S. No. 6 of 1891, Ramakrishna was the plaintiff and he died in 1914 and the defendant there is the plaintiff in this suit. The question is, was Ramakrishna the representative-in-interest of the 2nd defendant, the alleged adopted son? The appellant is claiming as the representative of Venkat Rao. He has obviously never been a legal representative of Ramakrishna. The contention apparently was that Ramakrishna represented the whole body of the reversioners and the suit was not personal to himself. Both the District Judge and the learned Judges of this Court have held against these contentions and have given very full reasons for their decisions. Nothing has been shown to me to cause me to come to any other conclusion than that arrived at by the learned Judges. The appeal must in my view be decided in favour of the plaintiff on both the grounds argued and therefore must be dismissed with costs.

Jackson, J.

Jackson, J.—Suit to declare an adoption invalid. The Lower Court decreed the suit and defendants appeal.

Venkat Rao, brother of the Maharaja of Pittapur, died in 1871. His widow 1st defendant, and another widow survived him until 1889 from which date 1st defendant was sole survivor, enjoying the life-interest in the Gollaprole estate. She lived with her own three brothers, one of whom is D.W. 27, and, as he says, she paid all household expenses, and made him gifts, so that his income from Rs. 2,000 ancestral property, rose to one of Rs. 40,000. In 1886, fifteen years after her husband's death, she took her sister's son in adoption, claiming to have authority from her husband. This authority based on an alleged copy of a document in the Collector's office was found to be a forgery and the adoption was set aside in a suit brought against the 1st defendant by plaintiff's father. Ex. SSSS-4. His father died in 1890, and plaintiff succeeded to the Pittapur estate by virtue of a will. His adoptive brother, the 2nd defendant's father, challenged his claim to be the son of the Raja in 1891; a point which was never finally determined by the Courts, because the will gave sufficient title to the property. The Privy Council pronounced judgment in this matter in 1899. *Sri Rajah Rao Venkata Surya Mahipathi Ramakrishna Rao Bahadur* v. *Court of Wards and Venkata Kumari Mahipathi Surya Rao.*[20] The 1st defendant accepted the plaintiff as her nephew, and was on terms of affectionate intimacy with him and his family during the next fourteen years, throughout which she continued to live with her brothers. This brings us to 1913, when in about June her brother D.W. 27 came to the Dewan of the Pittapur Raja, P.W. 111 (page 756) and suggested that the Raja should give him Rs. 2½ lakhs. The brother denies this (page 651)

---

20. (1899) L.R. 26 I.A. 83: I.L.R. 22 Mad. 383: 9 M.L.J. (Supp) 1.

Sri Krishnayya Rao v. Rajah of Pittapur. Jackson, J.

though he admits (p. 650) that he required Rs. 2¼ lakhs. All the Courts so far have accepted the statement of the Dewan as true; and as this brother in the previous suit tried to affirm the forged authority to adopt, he may fairly be described as an unscrupulous man. There are several notes from the 1st defendant to the plaintiff in the matter of this Rs. 2¼ lakhs which the trial Court (paragraph 106) accepted rightly, in my opinion, as genuine, Exs. EE—EE-8. pages 1071—1085. They are not dated, but the plaintiff's statement that they came in 1913 may be accepted. The last is put by the District Judge to 3rd January 1914 (paragraph 105). In November the plaintiff saw the 1st defendant and did not accede to her request to help her brothers. On 4th February 1914 he got the letter Ex. EE-9, dated 2nd February, in which the 1st defendant announces to him for the first time (as he states and may be accepted) that she had decided to adopt the son of the adoptive brother who challenged the plaintiff's succession in 1891.

Somewhere about the 1st of December (more than two months before February 15), the 1st defendant took legal advice about this adoption from Krishnaswami Chetti, D.W. 9. Venkatasubba Rao, J., observes that his evidence carries much weight from the fact that he at one time was a great figure in legal circles at Madras. The trial Judge on a perusal of his deposition taken on commission thought him shuffling and evasive. Except for a certain vagueness about medical details which were no concern of his, I do not find his evidence intrinsically bad, and though its extrinsic claim to credibility is not fully upon the record, I accept Krishnaswami's statement that he is a retired vakil of this Court as sufficient guarantee of probity, and prefer to regard him as a trustworthy witness. Presumably as a result of his advice letters were sent to the nearest sapindas, the plaintiff and his adoptive brother on 2nd February and 27th January respectively, and the adoption was fixed for 8th February (page 507). On 7th February no reply had come from the plaintiff and he was sent a reminder, Ex. EE-10. On 11th February he replied refusing his consent, Ex. EE-11. On 15th February the adoption was nevertheless performed, and, I may add, that I see no reason to hold that the performance itself was other than valid. But three, four or five days before the ceremony, Krishnaswami Chetti had a surprise. He suddenly came to know that the boy's father had agreed to make a gift of some part of the property to Ramayamma, the 1st defendant; and with that deed of gift he had nothing to do. The stamp-paper for it was bought on the 6th February, so the parties had kept their secret well. Over this episode of the gift there is much contradiction and prevarication which to my mind is unaccountable if the parties are speaking to a plain, honest transaction. Paklam Kuppiah, D.W. 1, a servant of the Raja of Venkatagiri, who was instructing Krishnaswami Chetty and acting generally as go-between, says, "1st defendant said that in case of the

Sri Krishnayya Rao v. Rajah of Pittapur. — Jackson J.

adoption half of the estate should be given to her to liquidate her debts which amounted to two lakhs or that the adopted son should take the whole estate and discharge these debts. 1st defendant asked me to speak about this matter to Ramakrishnayya and I did so. Ramakrishnayya said to me that the boy should also be consulted as he was a major. I therefore asked the boy. The boy said that he would give away half the estate. The 1st defendant accepted this proposal." The 1st defendant herself deposes: "After the adoption was made I proposed to the 2nd defendant to take the whole estate and clear off my debts and he said he would take half . . . I made this proposal through D.Ws. 27 and 1." The adoptee, 2nd defendant, D.W. 49 denies that he spoke to the 1st defendant before the adoption. He bears out D.W. 1, that the latter came to him after consulting his father, but he does not agree that the proposal came originally as an alternative; that he should pay the debts or give half the estate. He says "I replied it would be better if I were given half the estate free of debts." He admits however that he knew neither the amount of the debts nor the value of the estate, so it is hardly likely that he himself made the alternative proposal and it may be noted that Krishnaswami Chetty says "the boy's father had agreed." Venkatasubba Rao, J., finds that the suggestion that the 1st defendant was to take half the estate emanated from the 2nd defendant who was anxious to retain his half unencumbered by debt, a fact which shows that the arrangement was not and could not have been a device planned by the widow. There is no doubt at all that the suggestion that the adoptee should pay the debts came first from the other side, the widow. Whether, as D.W. 1 says, the alternative that half the estate should be gifted also came from the widow, or whether the adoptee's father confronted with this claim for payment of indeterminate debts suggested the alternative of an outright gift, does not much matter; but in any case I see no reason to suppose that the adoptee who knew nothing about the figures and values (*cf.* D.W. 27, p. 653) himself originated the proposal; and the suggestion that he originated it because he wanted an unencumbered estate may be simply met by the fact that these debts were in no possible sense an encumbrance upon the estate. Venkatasubba Rao, J., himself concedes that Bakkam Kuppiah, D. W. 1, gives very clear evidence on this point; and that is the evidence that I prefer to accept. A super-subtle argument has been advanced that this transaction was not a bargain upon which the adoption proceeded, but an entirely independent arrangement. I agree with Krishnan, J., that there is no force in this, even on the defence's own showing. The 1st defendant was concerned about debts which were unlikely to be repaid if she went on with the adoption, so obviously she was not prepared to adopt unless some satisfactory arrangement was made. The 2nd defendant made an offer which she thought satisfactory, and so she adopted him. The 2nd defendant said "she wished to adopt me

on condition of my discharging her debts myself." When this was read over to him he demurred to the word "condition," but, taking the evidence on this matter as a whole, it can only be described as a condition, and not as an independent arrangement. If it had been a spontaneous outburst of generosity on the part of 2nd defendant for which theory there is really no evidence, why was not the whole world told of it? And if the defendant and her brothers felt embarrassed at this compromising gift, surely it would have been natural if not inevitable for them to consult their legal adviser. That they chose on the contrary to keep him in the dark points to the conclusion that it was their own proposal, and a proposal which they felt should be concealed until concealment was no longer possible. Importance seems to attach to a theory that the 1st defendant may have determined to adopt, and then some time afterwards thought that she might as well get something substantial from the adoptee; the idea being that the original purpose was religious and it subsequently received a slightly secular tinge. I may say here at once, though this conclusion has only been reached after a consideration of all the facts, that I should put the transaction exactly the other way. This lady who made no adoption from 1871 the date of her widowhood till 1886 when on the strength of a forged document she adopted her sister's son, and again took no decisive step till 1914 after she had quarrelled with the reversioner over the 2½ lakhs which her brothers wanted, was in my opinion entirely actuated by mercenary motives when she proposed the adoption, and the religious motive only made its appearance when it was requisite for the suit. There is no need to assume that an adoption must invariably import an atmosphere of religion. In a case where after long delay the widow adopted under an arrangement with the adoptee's natural father by which she got absolutely one-fourth of the estate Sankaran Nair, J., remarked, "In making an adoption under such circumstances the widow would be doing an irreligious act." *Rama Rao* v. *Narasimha Nayanim Varu.*[21] And in *Anne Brahmayya* v. *Chelasami Rattayya*[18] Ramesam, J., observes "No widow's adoption can stand scrutiny if her motives are important." But even assuming (what in fact I cannot assume) that the widow at first proposed this adoption from pure motives, and other counsels prevailed, I do not find that it affects the question which we have to decide. The vital point to consider is what were the terms on which the adoption was performed on February 15. That on January 15 or thereabouts the gift of half the estate may not have been yet arranged seems to me to be immaterial.

Venkatasubba Rao, J., finds on the evidence that it unmistakably shows that the adoption had a distinct origin independent of the terms; the transaction as originally conceived was pure; but as the

---

18. (1924) 20 L.W. 503 at 516. 21. (1915) 28 M.L.J. 363 at 366.

Sri Krishnayya Rao v. Rajah of Pittapur. — Jackson, J.

day of adoption approached the 1st defendant wanted to have an arrangement for the payment of her debts. I would remark in passing that there is no logical reason for separating by an interval of time the idea of adoption and the idea of payment. As soon as 1st defendant thought of adoption she must have known that her power of paying the debts would by that very adopting be materially affected. But even if she only woke up later to the fact that she would be comparatively a poor woman after the adoption, I cannot see that it makes the slightest difference. Before she actually adopted, and that is the point, the plan was cut and dried, and the papers bought and prepared for her taking over as absolute owner half her life estate. I may note here that the defence attaches great importance to the circumstance that the EE series of letters concludes at the beginning of January, and 1st defendant was already consulting her vakil about an adoption early in December, when, as Mr. Grant puts it, she went over to the enemy's camp. It is argued that till January she still hoped to get Rs. 2½ lakhs from Pittapur, and therefore in December her idea of adoption was untainted by any thought of other gain. But if in December she still cherished hopes from Pittapur, why did she go into the other camp, and why did she not take the plaintiff with whom she was still, it is argued, on intimate terms, into her confidence? To my mind the simple answer is that after the interview with the plaintiff in November she knew that she had no hope of the money, so her brothers proceeded to take other measures, and the idea of adoption which may have been mooted even previously took practical shape. Of course it cannot be positively found that a religious motive never at any time crossed her mind; but in my opinion any such passing glimmer was entirely extinguished by material considerations. On the facts I hold that the material considerations were the only substantial motive from the first. She adopted the 2nd defendant in order to obtain half the estate in order to pay off the debts.

Much unnecessary mystery attaches to these debts. They were subsequently paid off to the tune of 2,40,000 rupees by moneys obtained on the mortgage of this estate and of property of 1st defendant's brothers from the Raja of Venkatagiri. The Raja's agent D.W. 1 says that he discharged a registered bond for Rs. 10,000, pro-notes for Rs. 40,000 and there were some pledges of jewels. After liquidating the 1st defendant's debts there was a balance of Rs. 10,000. 1st defendant says (D.W. 8) "my debts, my brothers had no debts at any time. I never give moneys to my brothers for acquiring properties. They got into debts on account of me. They were acquiring some properties." 1st defendant's brother D.W. 27 says "I was always borrowing for the purpose of getting lands," and then (p. 651) after detailing various transactions, "the 1st defendant discharged most of the above debts. Most of the documents were executed by me or

by my brother or Venkayya (the nephew). In the documents we executed there would be no reference to 1st defendant." Venkayya D.W. 22 says Rs. 25 to 30 thousand debts of 1st defendant were discharged with the Venkatagiri loan (p. 583). As mortgagee the Venkatagiri Raja must have the vouchers for the loans he discharged, and 1st defendant swears that she gave them to him. His treasurer D.W. 28 swears that she did not. I have not the least doubt that the reason why the vouchers are not forthcoming is that they will show that the bulk of the debts are the brothers' debts and not those of the 1st defendant. That is the well-considered finding of the trial Court in para. 112 of the judgment, which I endorse. Venkatasubba Rao, J., finds that when moneys were borrowed by the brothers it was the credit of 1st defendant that was usually pledged. That seems hardly borne out by the passage in the evidence of D.W. 27 which I have just quoted; but in any case I should be inclined to think it a distinction without a difference. It is agreed on all sides that the persons who benefited by these debts were the brothers. It may have pleased defendant 1 to help them to the extent of the income from her life estate, and "to treat the debts as her own debts". But she can hardly have regarded such debts as morally binding upon her, except in the sense that she engaged herself to help her brothers to the utmost of her power, which, to give the lady her due, she has undoubtedly done. It may have been a natural desire on her part to have the debts discharged by the adoptee on whom they were not legally binding; but I fail to see how it was a proper desire. The payment of debts loses the odour of sanctity when they are defrayed from another's pocket.

Sri Krishnayya Rao v. Rajah of Pittapur. Jackson, J.

It seems more than a coincidence that in 1913 the 1st defendant and her brother were soliciting, deny it as they may, the plaintiff for 2¼ lakhs, and before the next year was out, they had obtained precisely this sum, after the adoption had gone through. This is sought to be discounted by the circumstance that they first wanted the money in regard to a speculation over the Voratla estate, and then when they got the money they applied it to other purposes. 1st defendant's brother D.W. 27 admits that he required Rs. 2¼ lakhs to be deposited, if the Rani of Tuni agreed. No doubt he says that he had that sum on hand, but he produced no account, and his bare statement is worth nothing. Then he found he had to deposit 7 instead of 2¼ lakhs and gave up the idea; but that does not prove that he did not want the money in November. Besides, the Dewan, P.W. 111, whose veracity has not been suspected, says that it was for the Tuni business that the money was required.

On this view of the facts the law appears to be too plain to afford room for a question of law. The 1st defendant's brothers and nephew who frankly admit that they were battening on her life-estate apprehended that this source of income would be lost to

Sri Krishnayya Rao v. Rajah of Pittapur.

Jackson J.

them if 1st defendant died, and she had been ailing since 1912 (p. 463). As D.W. 27 says, she feared she would not live long. It seemed to them only fair that the Pittapur Raja who would get the reversion should make them some recompense. The letter Ex. EE expresses the sentiments of the family. "As they and myself depend entirely on you and as my estate at some time or other will be made over to you, an order (for pecuniary help) is requested." The plaintiff refused this help, so the brothers decided to help themselves, making the adoption their instrument to this end. The 1st defendant, as ever since the death of her husband, fell in with their design, and the 2nd defendant was adopted on the understanding that he alienated to the 1st defendant half the estate.

Naturally therefore the plaintiff, as sapinda to the widow, refused his consent.

An endeavour has been made to discount his refusal because his letter Ex. EE-11 does not display the pure judicial attitude. The analogy between a sapinda in these circumstances and a Court of law may be pressed too far. Obviously if he were a Court he would apply to have the case transferred, because his personal interests must always be involved. But on account of this personal interest it cannot be said that his judgment is vitiated from the outset. So long as he has exercised a reasonable judgment, and is not actuated by motives of fraud or corruption, his decision must be respected. His reasons, as set forth in Ex. EE-11, may be taken *seriatim*. "Not with an honest purpose either for the salvation of your husband or for the perpetuation of his line" but

(1) "bearing spite against me for my not rendering pecuniary help to your brothers"—that in my opinion is true and points to caprice.

(2) "With a view to put me to loss." This too I think true. There can be no doubt that 1st defendant who had been on very affectionate terms with the plaintiff (*cf.* EE-3) was completely estranged when he refused help. The whole style of her letter asking his sanction, and her deliberately fixing the adoption for a date which showed that she did not care whether she obtained that sanction or not, proves that she was largely actuated by spite, one of the motives included in the general term caprice.

An adoption may not be made in order to defeat the interest of a sapinda. *Vellanki Venkatakrishna Rao* v. *Venkata Rama Lakshmi*.[14]

This be it noted refers to purpose not to consequence. It was argued that the plaintiff had no right to give as a reason that the adoption would result in loss to himself. That may be quite correct, but it is not what the plaintiff writes. He says "with a view to

14. (1876) L.R. 4 I.A. 1 I.L.R. 1 Mad. 174 at 191 (P.C.).

GENERAL INDEX.

VOLUME LV.

Abatement—Order in execution—Appeal—Death of appellant—Legal representatives—Right to continue appeal .. 497

Adverse Possession—Decree obtained in action to resume possession—Defendant nevertheless continuing in undisturbed possession .. 251

Appropriation of payments—Debtor and creditor—Rights of creditor—Intention—Presumption .. 471

Abkari Act (I of 1886), S. 64—Acts of servant of renter or licensee—Liability of renter or licensee, when arises—Coolies directed to take toddy to a particular shop—Coolies taking the toddy to another shop—Renter, if guilty .. 712

Bar Councils Act of 1926, Ss. 8 & 14—Advocates enrolled in Madras High Court under Act—Insolvency jurisdiction of High Court—Acting in—Right of—Rules curtailing that right of Advocates—Validity of—Word "Practise"—Meaning .. 551

Benami transactions—Presumption of advancement—English and Indian laws—Husband and wife .. 651

Bills of Exchange Act of 1882, S. 64—Alteration—Meaning of—Accident—Alteration due to, if included .. 627

Buddhist Law—Burmese—Adopted son—Succession to adoptive parents—Right of—Forfeiture—Grounds .. 95

———Burmese — Adoption — Keittima son—Publicity and notoriety—Conduct inimical to adoptive parents .. 95

Burden of proof—Suit for possession of immoveable property — Limitation — *Onus probandi* .. 302

Calcutta Rent Act of 1920, Ss 14, 15 & 18—Landlord and tenant in—Meaning of—Ex-landlord and ex-tenant if included—Controller—Jurisdiction of—Erroneous exercise of—Remedy in case of—Appeal under S. 18—Standard rent —Fixing of, by Controller with retrospective operation—Power of—Contractual rent paid for a portion of period of tenancy—Landlord's right to amount paid—Standard rent in case of—From which date runs .. 464

Civil Procedure Code, S 2 (2) and O. 23, R 1—Order allowing suit to be withdrawn—If a decree .. 345

———**Ss. 39, 41 and 50**—Transfer of decree for execution—Effect—Jurisdiction of Court which passed decree and of Court of transfer—Death of judgment-debtor after execution started in latter Court—Order of latter Court bringing his legal representative on record — Irregularity or illegality — Submission by legal representative to order—Right to dispute its legality afterwards—Effect on .. 545

———**S 47**—Sale proclamation—Order fixing valuation of property—Appeal from .. 363

———**S. 73 and O. 21, R. 10**—Decree passed by one Court—Execution proceedings against the properties of the same judgment-debtor pending in another Court—Order of transfer of the decree from the former Court to the latter—Execution application in the latter Court before it actually received the decree—Jurisdiction of the Court to entertain—Assets received by transferee Court before it got the decree by transfer—Right of decree-holder to rateable distribution .. 120

———**S. 110, last clause**—Substantial question of law—Meaning .. 651

———**S. 115**—Order demanding additional Court-fee—Revision—If entertainable .. 345

———**O. 1, R. 10**—Suit on mortgage by benam'dar—Power of Court to make the real owner a party—Distinction between benamidar and trustee .. 856

C. P. Code, O. 13, R. 1. PAGE

———O. 13, R. 1—Civil Rules of Practice, R. 64—Court not passing an order for the production of documents or the filing of the list of documents—Party producing the document on the date of the hearing—Order summarily rejecting them—Propriety of .. 34

———O. 21, R. 66—Proclamation of sale—Valuation of property to be inserted in—Fixing of—Court if under a duty as to .. 363

———O. 22, Rr. 3, 4 and 10—Preliminary decree in a mortgage suit—Death of plaintiff subsequent to—Legal representative not brought on record within three months—Suit if abates—Application for setting aside abatement after three months—Order by Court that suit did not abate—Appeal—Revision—Civil Procedure Code, O. 43, R. 1, cl. (*c*) .. 253

———O. 32, Rr 4 and 7—Guardian having interest adverse to minor—Compromise by—Sanction by Court—Setting aside of .. 746

———O 34, R. 3 (2), proviso—Power to grant extension of time—"Upon good cause shown" .. 81

———O 37—Jurisdiction to act under—Sub-Court which is not a Court of Small Causes but which is merely invested with the jurisdiction of a Small Cause Court under a notification—Jurisdiction of, to act under O. 37 when exercising Small Cause powers—O. 37, R. 1 (*d*)—Applicability of, to Courts notified under notification of 23rd October, 1877—Words "having ordinary original civil jurisdiction" in that notification—Meaning of .. 114

———O 38, R 13—Interim order of attachment before judgment by Small Cause Court before Act I of 1926—Interim order made absolute subsequent to the coming into force of the Act—Validity of attachment—Act I of 1926, if retrospective .. 382

———O. 41, R. 10, S. 107 (2)—Security for costs—Failure of appellant to furnish within time allowed—Dismissal of appeal on ground of—Restoration—Power of Court .. 330

———Sch. II, para. 1—Reference to arbitration—Suit for dissolution of partnership and recovery of the share of the amount due to the plaintiff and his brother the 4th defendant—4th defendant not joining in the reference—Award decreeing the share claimed—Objection—Decree by Court for share of the plaintiff alone, deducting the share of the 4th defendant—Validity of the reference and the subsequent proceedings .. 78

———Sch II, S 20—Application filed under, and registered as a suit—*Ex parte* decree in—Refusal to set aside—Appeal—Maintainability—O. 43, R. 1 (*d*), S. 104 (1) (*f*)—Order allowing appeal—Effect of .. 262

———Sch. III, para. 11—Mortgage effected without the permission of the Collector—Joint Hindu family, personal liability of minor member on mortgage executed by the karta and adult members of the family .. 292

Company. PAGE

Companies—Amalgamation—Scheme of, by which one company takes over the undertaking of another—Validity—Test of, as regards transferor and transferee companies—Distinction—Indian Companies Act, S. 213—Appointment of liquidators pursuant to scheme of amalgamation—Shareholders of transferor company—Suit by, against transferor and transferee companies and liquidators, for declaration of invalidity of amalgamation and of appointment of liquidators—Suit by them in their personal capacity—Scope of—Reliefs claimable in—Transferee company—Reliefs claimable against.. 697

Company—Director of, excluded from acting as such by other directors of company—Suit in his own name by, against directors who excluded him—Right of—Insurance Company—Articles of Association of—Construction—Policy-holders' meeting for election of Policy-holders' Directors—Adjournment of—Prohibition of—What amounts to—Adjournment of, for a *bona fide* purpose—What amounts to—Validity of—Common Law right of every meeting to adjourn itself—Meeting to be held at company's office—Provision as to—Non-compliance with — Effect — First meeting held at company's office but adjourned meeting held elsewhere—Effect—Objection to meeting on ground of its not being held in company's office—If available to company and directors—Company and directors preventing meeting from being held in company's office—Effect—Party cannot take advantage of his own wrong—Application of principle of—Adjourned meeting same meeting but a continuation of it—Proxies registered for original meeting if available for adjourned meeting—*Bona fide* in fact—*Bona fide* in law—No distinction between .. 385

———Meeting of—Notice of business to be transacted at—Insufficiency of—

Companies Act, S. 213. PAGE

Shareholder's right to complain of—Knowledge prior on his part of business to be transacted—Effect—Hearing at meeting—Denial to shareholder of—What amounts to—Sense of meeting against hearing him further—Shareholder in question with knowledge thereof desisting from making further efforts to be heard—No denial of hearing in such a case .. 697

Companies Act, S 213—Liquidators appointed for winding up and amalgamation—Resolution appointing, restricting them in the exercise of their statutory duties — Irregularity of— Objection to—Maintainability of, after lapse of time and where no injustice has resulted from it .. 697

Contract — Construction—Sale deed — Agreement by vendee to reconvey—Option exercisable by vendor or his heirs or assigns—Death of vendor—Assignment of benefit of contract by vendor's son in favour of stranger—Assignee's suit for specific performance—"Standing offer" or "completed contract" .. 198

————Construction—Goods contracted for—Description of—What amounts to. 1

Contract Act, S. 63—Agreement to dispense as defined by S 2 (e) of Contract Act—Necessity—Breach of contract to deliver goods—Damages for—Claim to — Maintainability — Buyer wholly dispensing with delivery—Effect. 1

————S. 73—Damages for breach of contract—Claim for — Maintainability—Plaintiff wholly dispensing with performance—Effect .. 1

————S. 73—Damages for breach of contract—Remoteness of damage—Loss of profits—Finding of fact of Appellate Court—Credibility of witnesses .. 248

————S. 240—Partner—Lender receiving share of profits if and when a—Labbai or Ejman partnership—Muthalalis in — If partners — Ejmans and Kutalis in—Status of .. 12

Court Fees Act (Madras Act V of 1922), S. 7 (iv) (a) and Sch. II, Art. 77 (A)—Prior suit for possession of land and for maintenance in the alternative—Compromise of by awarding maintenance and allowing withdrawal of relief as to possession—Suit to set aside compromise—Court-fees .. 345

Criminal Procedure Code, Ss. 77 and 79—Scope—Warrant—Forester, if can endorse to watcher .. 220

Cr. P. Code, S. 423. PAGE

————S. 107—Joint trial under—Legality—Conditions .. 24

————S. 107—Security given under—Commencement of period of—Date of final order under S. 118, or of a preliminary order under S. 112 .. 24

————Ss. 144 and 435—Order by a Magistrate under S. 144—Revision to High Court—Maintainability—Effect of the amendment of S. 435 by the omission of clause (3)—Government of India Act, S. 107—Orders under S. 145—Revision .. 621

————S. 145—Petition to District Magistrate—Transfer by District Magistrate to Sub-Divisional Magistrate having no territorial jurisdiction over the land—Preliminary order and final order by the Sub-Divisional Magistrate—Validity of—Duty of Magistrate to write a judgment giving reasons. 693

————S. 147—Right to bury dead persons in land—Question to be decided by the Magistrate .. 40

————S 154—Information recorded under—Telegram disclosing the commission of an offence, if—Examination by police officer of party sending telegram—Statement recorded at—Admissibility—Ss. 154, 157, 162—Investigation in S. 162—Meaning of—Alibi—Plea of—Proof of to be strict—S. 157—Action under, on telegram—Power to take .. 231

————S. 162 (1), para. (1)—"Any such statement"—If covers oral statements. 351

————S. 183 —Applicability — Offence committed outside British India—Jurisdiction of British Court to try .. 499

————S. 264—Record—What constitutes—Summary trial by Magistrate or Bench—Appeal—Power of Appellate Court to look into complaint and sworn statement .. 117

————Ss 265, 366, 367—Bench of Magistrates—Trial by—Judgment prepared, delivered and signed by presiding officer only—Validity .. 576

————S 307—Reference by Sessions Judge under — Permissibility — Conditions—Jurisdiction and duty of High Court in such reference—Whole case if open before High Court .. 591

————Ss. 423 and 439—Discharge of accused—Jurisdiction of High Court to set aside and order committal .. 674

Cr. P. Code, S. 428. PAGE

———S. 428—Applicability—Statement by defence witness—Power of Appellate Court to examine him as a Court witness in order to ascertain the value of his statement .. 676

———S. 439 (4)—Applicability—Acquittal—Finding of—Alteration into one of conviction—Revision—Jurisdiction of High Court .. 786

———Ss. 476, 476-A and 476-B—Refusal by District Munsif to make a complaint—Appeal to District Judge—Order of District Judge making a complaint—Appeal to the High Court—Maintainability .. 444

———S. 476 (b)—Proceedings under—Applicability of S. 428 to—Appeal against order under S. 476—Additional evidence in—Jurisdiction to receive .. 218

———S. 526—Order of transfer—Notice to accused—Necessity for—Order if final—Re-transfer of case—Power of Court .. 217

Criminal trial—Documents written by accused filed along with his statement—Duty of Criminal Court to consider.. 624

———Irregularity—Accused's pleader—Arguments of—Refusal to hear .. 626

———Magistrate receiving notes of arguments from prosecution after case closed without notice to accused—Propriety—Conviction, if can stand .. 712

Custom—Evidence and proof of—Instances—Absence of—Effect .. 746

Damages — Assessment of —Principle—Rule of highest intermediate value between date of conversion and date of verdict—Ordinary goods of merchandise—Applicability .. 586

Decree—Construction—Appeal by Official Receiver from a decree in an ordinary action—Dismissal of appeal with the direction that appellant do pay the respondents their costs—Costs, if can be recovered personally from the Official Receiver—Indemnity of Official Receiver—English practice—Practice in Madras and Calcutta High Courts—Executing Court—Duty of .. 873

———Minor defendant attaining majority during pendency of suit—Decree in suit against, without fact of his attaining majority being brought to notice of Court—Validity of, against minor—Decree based on adjudication on merits—Decree based on compromise entered into by his guardian *ad litem*—Distinction .. 374

Hindu Law. PAGE

Ejectment, action of—Plaintiff's title—Onus—Diluviated lands—Adverse possession—Bengal Act VII of 1876 (Land Registration Act)—General Register, entries in, whether conclusive .. 56

Ejectment suit—Onus on plaintiff to prove his title .. 56

Evidence Act, S. 33—Applicability—Conditions justifying admissibility of evidence—Legal representative .. 894

Evidence—Age—Witnesses deposing after long lapse of time—Evidence of—Contemporaneous statements of parents of parties made at a time when there could have been no possible motive for misrepresenting the facts—Former far less reliable than latter .. 88

Guardian—Minor widow—Preference of husband's sapindas to paternal relations—*De facto* guardian—Actions which would constitute a person as a *de facto* guardian—Legal guardian treating another as guardian and taking a conveyance of the minor's property from him—Validity of the conveyance—Alienation by *de facto* guardian—When valid—Unauthorised or improper alienation by *de facto* guardian—Void or voidable—Amount spent by alienee to relieve the burden on the estate—Right to reimbursement .. 861

High Court—Powers of, when the mofussil Courts are closed for the vacation—Jurisdiction to receive a plaint which ought to be filed in a mofussil Court and pass interlocutory orders—Jurisdiction to pass interlocutory orders in suit pending in mofussil Courts—Letters Patent, clause 13—Form and contents of petition—Power of High Court to grant bail—Criminal Procedure Code, S. 498 .. 690

Hindu Law—Adoption—Authority to adopt—Construction—Choice of boy—Restriction on widow as regards—What amounts to—Power given to two widows to adopt—Joint power or power to be exercised by senior widow with the concurrence of the junior—Both widows participating in adoption—Validity of adoption in case of—Adoption by both or by senior widow only—Validity of joint power to adopt—Trusteeship vested in widow in right of husband—Adopted son if divests .. 757

———Gift—Condition subsequent—Ulterior disposition not valid—Prior disposition—Effect on .. 42

———Gift—Construction—Gift by husband to wife—Estate conveyed—Limited estate or absolute estate .. 42

Hindu Law. PAGE

——Gift—Husband—Immoveable property given to wife by—Estate taken in—Devolution of, on death of wife .. 42

——Husband and wife—Transfer to wife by husband—Estate conveyed—Mithila Law—Gift pure and simple—Transfer for consideration—Distinction .. 615

——Inheritance — Daughters—Right to enlarge estates by compromise—Right to provide for enjoyment of estate .. 746

——Joint family—Alienation by father—Eldest son not impeaching the alienation within the period of limitation—Suit by the younger sons impeaching the alienation—Maintainability .. 30

——Joint family—Manager—Mortgage in favour of family—Amount due under—Waiver or giving up of—Validity against other members .. 109

——Joint family—Mortgage by father—Validity—Family business—Purchase of goods on credit for—Mortgage for price of, before expiry of credit period allowed—Debt not demandable or enforceable at law if due and payable—Family trade or business—Test—Purchase and sale of different commodity if outside scope of—Grandfather—Business carried on by, stopped for some years before his death and started by father some time afterwards if a family business—Hindu father of trading commodity—Starting of new business by, as family business—Power of .. 471

——Joint family — Partition — Branches—Partition between—Partition between members of each branch *inter se* if effected by—Construction of partition deed—Registered partition deed effecting division by metes and bounds—Re-union between parties to—Unregistered document purporting to effect—Admissibility in evidence—Registration Act, S 49—Re-union of properties—Re-union of status—No distinction between—Proof of re-union by conduct subsequent to partition deed—Permissibility—Minor—Guardian —Adverse possession against minor—Plea of, in regard to property in guardian's possession as such—Permissibility of.. 733

——Joint family — Partition — Deed effecting—Effect—Partition as regards all the members or as regards some only—Construction of deed—Physical division of some items of property—Deed not effecting—Effect—Deed of partition clearly and unambiguously effecting severance as regards all—Evidence extrinsic to control or alter—Admissibility—Divided status — Evidence — Housekeeping and worship—Expenses of—Division into shares of—Re-union—Hindu with minor son—Re-union with brother with minor son—Validity of—Status of minors—Effect of re-union—Restoration of co-parcenery—Proof of re-union .. 132

——Joint family—Sale by manager—Suit by junior members to set aside—Proportion of proved consideration to the value of the vendor's share—Form of decree—Equities in favour of alienee. 489

——Maintenance—Wife living apart from her husband, disentitled to maintenance .. 242

——Mitakshara School—Gift of immoveable property by husband to wife—Stridhan, succession to—Wife's power of alienation over such property—Construction of deed of settlement disinheriting settlor's son and gifting the entire property to settlor's wife, with gift over to grandson on attaining majority—Condition subsequent—Provision in favour of unborn person, inoperative under the Hindu Law (since modified by the disposition of Property Act, XV of 1916)—When ulterior disposition not valid, prior disposition not thereby affected—Transfer of Property Act, 1882, Ss. 28 and 30 .. 42

——Widow—Adoption with consent of sapindas—Agreement to adopt a major son of one of two sapindas—Consent of that sapinda—Arrangement to settle half the husband's estate upon the widow to discharge her personal debts and to pay her maintenance to be charged on the other estate—Subsequent application by the widow to the other sapinda for his consent—Refusal on the ground of corrupt motive and selfish gain on the part of the widow—Adoption by widow—Execution of settlement and maintenance deeds—Validity of adoption—Power of Court to scan widow's motive in making adoption—Sapinda when justified in refusing consent to adoption by widow .. 894

——Widow—Co-widows—Estate inherited by—Nature and incidents of—Partition between widows—Effect—Mortgage for necessary purposes by one widow—Binding character of, on co-widow—Mortgage without her concurrence—Concurrence not applied for—Concurrence applied for but improperly refused—Distinction .. 339

——Widow not heir of last male owner but entitled to maintenance and

Hindu Law PAGE

residence out of it—Possession of—Nature of—Sums spent by her for purposes binding on estate—Re-payment of—Right to—Nature of—Suit by her to recover such sums—Limitation—Starting point .. 436

———Widow—Surrender — Alienation by widow—Subsequent surrender—Validity .. 859

———Will — Construction — Son — Life-estate to, and absolute estate to his male children after his death—Period of taking—Words indicating—Court's power to supply, when not mentioned in will—Condition—Words "Aan Santhathi"—Meaning .. 683

Inam—Karnam service inam—Holder of inam removed from the office of karnam but continuing in possession of the lands attached to the inam—Death of holder leaving widow and daughter—Continuance in possession by the widow—Enfranchisement of inam in the name of the widow and the daughter—Deed of enfranchisement conferring freehold estate on the grantees—Subsequent alienation by the widow and the daughter reciting necessity for it and purporting to convey absolute title—Nature of estate taken by the alienee .. 579

Income-tax Act (VII of 1918), Ss. 3 and 52—Permanently settled estate—Income from forests and fisheries—If liable to income-tax—Assessment of such income—Suit to recover the amount paid—Maintainability .. 770

———**(XI of 1922), Ss 3 and 4 (2)**—Amount to be taxed—Income of year previous to the year of assessment—Material date for residence in British India—"Resident in British India"—Meaning of—Assessee carrying on business at Ceylon but visiting his native village frequently—Assessee physically present in native village when profits accrued in Ceylon but not physically present there when remittances were received or during the year of assessment—Effect .. 844

———S 10 (2) (iii)—Borrowed capital used for a separate branch of the business—Failure of this branch of business and loss of amount—Assessment for the year following the year of loss—Interest paid on borrowed capital during the year of assessment—Deduction of .. 600

———S 10 (2) (iii)—Loan on "tavanai" system—Interest payable on—

Lease. PAGE

Deduction in respect of—Assessee's right to—Tavanai periods ending in year of account—Tavanai periods ending in previous years—Distinction .. 850

———S. 10 (2) (iii)—Partner—Loan by, to partnership in addition to subscribed capital—Interest paid to him by partnership on—Deduction of—Right of partnership to claim .. 416

———S. 10 (2) (ix)—Capital payment—Expenditure not being capital—Payment made for purpose of working contract—Payment made for obtaining contract—Distinction—Test .. 66

———S. 66 (2)—Point of law not raised in application before the Commissioner—If can be raised subsequently .. 19

Insolvency — Creditors of insolvent — Trade creditors—Preference of, to other unsecured creditors—No provision in India, law for .. 12

———Hindu Law — Joint family — Father and manager of—Adjudication of, under Presidency Towns Insolvency Act—Official Assignee in whom property is vested on—Rights of, with regard to interests in joint family property of minor undivided sons of insolvent—Power to sell their interests for debts, neither illegal nor immoral, of the insolvent—Partition suit by sons—Filing of—Effect—Transfer of Property Act, S. 52—Suit if affected by terms of principle of—Hindu Law—Father—Sale of sons' interest in family property for discharge of proper debts—Power of severance in status between him and sons—Effect of—Official Assignee—Order vesting property in—Not equal to attachment of same .. 176

———Preference of some creditors to others—Agreement by Official Assignee securing—Validity—Sanction of such agreement—Jurisdiction of Insolvency Court—Presidency Towns Insolvency Act, S. 49 (5)—Contract Act, S. 23 .. 657

Land tenures—Ghatwali tenure in Birbhum—Inalienability—Effect of Sonthal Parganas Rural Police Regulation, 1910, Regulation IV of 1910—Non-liability of tenure from sale in execution of decree .. 7

Lease — Construction — Patni lease of zamindari lands granted by zamindar—Lessee's right under—Soil of lands leased—Property in—Transfer of, or creation of leasehold interest only—Words "Including all interests there-

Lease. PAGE

in'—Use of—Effect—Execution of soil for making bricks—Lessee's right of—Injunction against lessee in event of unauthorised user—Lessor's right to sue for—Lease made in accordance with terms of Regulation VIII of 1819—Effect—Minerals—Clay used for making of bricks if within meaning of—Perpetual lease—No annihilation of lessor's interest under .. 456

———Lease for a term—Renewal of, at option of lessee—Covenant for—Specific performance of—Right to—Portion small of demised property—Person owning and possessing only at expiry of term—Right of, to claim renewal as regards entire property demised or the part in his possession—Owners of remaining part neither parties to suit nor claiming renewal .. 646

Legal Practitioners Act, S. 13 (b)—Improper conduct—What amounts to.. 170

Letters Patent (Madras), clause 12—Suit for land—Administration suit, if—Ancillary relief of partition—Effect—Power of Court to adjudicate upon title to immoveable property outside its jurisdiction .. 266

Limitation Act (IX of 1908), S. 15—Joint judgment-debtors—Stay of execution as against one—Period of—Exclusion of, in computing time allowed for execution as regards others—Order permitting execution against them—Partial stay order if within section—Order adjudicating judgment-debtor insolvent—If operates as stay of execution .. 156

———**Art. 11**—Civil Procedure Code (1908), O. 21, R. 63—To found a claim petition, the property must be *de facto* attached—Attachment, a 'real thing' and indispensible—Mere order for attachment, insufficient—Order rejecting claim petition, when a nullity .. 122

———**Arts. 61, 120 and 132**—Applicability—Hindu widow in possession in lieu of maintenance—Suit by, to recover moneys spent by her for binding purposes—Limitation .. 436

———**Arts. 66 and 116**—Registered mortgage bond—Personal remedy—Suit to enforce—Limitation .. 506

———**Art. 144**—Adverse possession—Co-heirs—Onus of proof—Ouster—Assertion of hostile title .. 223

———**Art. 164**—Due service—Substituted service effected under Order 5, Rule 20, Civil Procedure Code—If amounts to .. 565

Madras District Municipalities Act (V of 1920), Ss. 49 and 51—Election of

Madras Forest Act, S. 51. PAGE

Councillor to Municipality—Disqualification of successful candidate at the time of the election—Remedy—Rules for the decision of disputes as to the validity of election—Rule 11 (*e*)—Petition by defeated candidate to set aside election on the ground of disqualification at the date of nomination and election—Maintainability—Trustee of temple—If an employer of hereditary Archaka of the temple—"Employee" and "Servant"—Meaning of .. 632

———**Ss. 249, 321 (5) and 338 (b)**—Licence for keeping a coffee-hotel—Cancellation of licence by Chairman of Municipal Council for reason other than the violation of the terms of the licence—If *ultra vires* of the powers of the Chairman—Prosecution for carrying on business without licence—Power of Court to go into the question of the legality of the order cancelling the licence .. 566

———**S. 249, cl. (5)**—Renewal of licence—Grant of—30 days' period fixed by clause—Failure to comply with—No bar to grant of renewal .. 495

Madras Estates Land Act, Ss. 42 and 147—Scope of—Transfer of holding—Absence of notice to landholder—Application by landholder against transferor for determination of excess rent—Transferee in possession on the date of the application but not made a party—Transferor *ex parte* and decree fixing excess rent—Subsequent suit for rent at enhanced rate against transferor and transferee—Transferee if bound by the prior decision fixing excess rent .. 72

———**S. 125**—Revenue Court decree for arrears of rent—Transfer of, to Civil Court for execution and sale of ryot's holding by the Court in execution—Sale if free of all encumbrances—"Sold for arrears" in S. 125—Meaning .. 314

———**Ss 189, 57 and 55**—Suit by ryot in Revenue Court under S. 55 of Act—Dismissal of, on ground that he was not entitled to demand a patta—Subsequent suit by him in Civil Court for possession of same land—Maintainability .. 379

———**Ch. XI and S. 205**—Orders passed by the Board of Revenue—Power of High Court to revise—Civil Procedure Code, S. 115—Government of India Act, S. 107 .. 798

Madras Forest Act, S. 51—Watcher—If a forest officer .. 220

Madras Irrigation Cess Act—Ryotwari tenure — Chingleput District — Thirty years' settlement of 1910—Notification of 1st June, 1910—Clause 36—Reservation in—Meaning and effect—Achukattu lands—Wet crops raised on—Levy of wet rate in case of—Legality—Wet crops raised even prior to settlement of 1910—Effect .. 281

Madras Local Boards Act (XIV of 1920), Ss. 3 (14), 159 and 207—Prosecution against representative of a community—Treasurer of the community if can be said to be the owner .. 206

———(V of 1884), S. 6 and (XIV of 1920), Ss 5, 207 and 233—Limits of Union—Alteration of—Revenue village constituted as a Union—Enlargement of boundaries by the Board of Revenue—Effect on the boundaries of the Union—Madras Survey and Boundaries Act (IV of 1897)—Power of Survey Officer to fix the limits of a Union—Assessment of tax on house situate outside Union—Power of President to issue summons to the owner of the house to appear before him to be examined—Disregarding of such summons—If amounts to an offence .. 718

———Ss. 24 and 223—Persons expressly authorised to file complaints—If confined to persons to whom the President may delegate his authority under S. 24 .. 573

———Ss. 163, 212 (9), 219 and 221—Erection of pandal without obtaining licence—Rights of Union Board—Union Board fixing a penalty—Power of Union Board to move Magistrate to recover the amount—Proceeding under S. 221—Defaulting party if can plead that no amount was due from him .. 27

———S. 166—Bus driving along road without licence—Liability of driver and owner for conviction .. 204

———S 166 (1)—"Plying any motor vehicle for hire"—Meaning of—Motor-car let out for hire within a Municipality—Car travelling beyond the Municipal limits and traversing District Board of Revenue to interfere with the from District Board .. 213

Madras Religious Endowments Act (I of 1925)—Religious Endowment Board constituted after notification—Acts done by the Board under the Act—Madras Act (II of 1927), S. 7—If *ultra vires*—Fresh notification under S. 10—If necessary—Question whether temple public or private—Power of Board to determine—Temple not in existence having fallen into ruins or having been demolished—Jurisdiction of the Board—Suit for setting aside Board's decision that temple is public—Territorial jurisdiction of Court .. 605

———(II of 1927), S 84—Question whether temple private or public—Jurisdiction of Endowment Board to determine—Suit questioning the competency of the Board to act on the ground that temple is private—Allegation by the Board in the written statement that temple is public—Board if precluded from deciding the question subsequently .. 679

Madras Revenue Recovery Act (II of 1864), Ss. 37-A and 38—Collector—Meaning of—Revenue Divisional Officer—Order by confirming the sale—Power of District Collector or the Board of Revenue to interfere with the sale—Regulation VII of 1828—If governs Act II of 1864 .. 33

Mahomedan Law—Hiba-bil-ewaz—Transfer by way of—Nature of .. 615

———Shafi school—Marriage of adult virgin without her consent—Validity—Difference between Hanafi and Shafi Law .. 828

Malabar Compensation for Tenants Improvements Act (Madras Act I of 1900), Ss. 5 and 6—Kanom—Redemption—Decree for—Ejectment of sub-lessee under—Compensation for improvements due to him—Payment of, into Court to his credit—Condition precedent—Dispute between him and kanomdar as to right to amount .. 450

Malabar Law—Marumakkatayam Law—Husband—Gift by, to wife and children by her—Estate taken under—Wife having children by former husband—Effect—Corporate unit not known to law—Creation by private individual—Power of .. 208

Minority—Burden of proof—Mortgage executed by minor, a nullity—Minor not estopped—Mahomedan Law—Age of puberty .. 88

Mortgage—Keeping alive—Intention express or implied—Necessity—Attached property — Mortgage of — Mortgagee paying off prior mortgagee—Subrogation—Conditions—Notice of subsequent incumbrance—Necessity—Partial discharge of prior mortgage—Meaning of .. 369

Motor Vehicles Act, S. 16 PAGE

Motor Vehicles Act (VIII of 1914), S. 16—Rules framed under the Act—Rule 27 (c)—Scope of—Accident—Meaning of—Rule if *ultra vires* .. 320

Negotiable Instruments Act (XXVI of 1881), S. 27—Partnership of three persons—Promissory note signed by two in their own names—Recital of execution and receipt of consideration for necessities of the firm—Liability of the third partner .. 574

North-West Frontier Province Regulation VII of 1901, S. 27 (a)—Object of—Custom—Plea of—Court's duty in case of—Evidence—Riwaj-i-am—Nature and evidentiary value of—Manuals of customary law issued by Government for each district—Evidentiary value of—Evidence adduced by custom in accordance with custom applicable to community of party according to manual of customary law of district—Sufficiency of, if not rebutted—Instances—Absence of—Effect — Daughter's daughter—Representation of, to mother predeceasing her father—Right of—Custom of—Right to share which had devolved on mother if follows from. 746

Original Side Rules (Madras), Order 6, Rule 4—Suit dismissed under—Application for restoration of, made after 30 days fixed by proviso to O 6, R. 4—Grant of—Discretion of Master—O. 1, R. 7 of Original Side Rules—Effect .. 839

Oudh Estates Act of 1869, S 22, Cl. (5) as amended by Act III of 1910—"Brother"—Meaning of, as regards Hindu talukdar—If includes natural or blood brother, where talukdar himself an adopted son—Succession—Scheme of Act as regards—Personal law of talukdar not excluded from—"Son" in both Acts—If includes adopted son, when used simpliciter—S. 22 of Act—Construction—Rational and orderly construction — Adoption — Theory of Hindu Law as to—Natural brother of adopted son—Right of, to succeed adopted son's estate in adoptive family 778

Pardanashin lady—Disposition of property—Onus on supporting the transaction .. 84

————Protection of—Principles of law laid down for, ought not to be transmuted into legal disability .. 84

Partnership—Insolvency — Creditors — Trade creditors—Preference of, to other unsecured creditors—Indian and English Law—Distinction .. 12

Practice. PAGE

————Labbai or Ejman partnership—Incidents of—Muthalalis, Ejmans and Kutalis in partnership—Status of .. 12

Penal Code (XLV of 1860), S 84—Defence under—Onus of proof—S. 86—Criminal intent required for offence—Proof of—Presumption of—Wrongfulness of act—Accused's knowledge of—Presumption from—Insanity—Plea of—Proof of .. 228

————**S. 216**—Essentials to be proved—Acquittal of the person harboured—Effect on conviction and sentence .. 503

————**S. 290**—Prosecution under—Joint owner of property not in actual possession of same—Liability of—S. 268—Public nuisance—Allowing prickly pear to spread on to a public road if a—Prosecution for—Right to institute—Local Fund Overseer—Prosecution by, as such—Legality of—Complainant—Sworn statement from—Omission to take—Irregularity or illegality .. 715

————**Ss 352 and 353**—Warrant for arrest made out in the name of a forester—Endorsement of warrant by forester to watcher—Arrest by watcher—Legality—Assault of watcher by the accused who questioned the power of the watcher to arrest—Nature of offence .. 220

————**S 407**—Entrustment of goods to carrier at Mysore for delivery at Mangalore—Non-delivery of part of goods at Mangalore—Charge of criminal breach of trust—Absence of evidence as to where or when the goods were abstracted—Jurisdiction of Magistrate at Mangalore to try the offence .. 499

————**S. 425**—Mischief—Putting property to its normal use if can amount to—Forest—Grazing rights in, reserved for holders of permits—Grazing of cattle in case of, by person without permit—Offence of, which he is guilty—Mischief—Theft .. 767

Practice—Mistake of law—Money paid under—Recoverability .. 770

————Rule of practice—Alteration of, when inconvenient—Power of competent authority as regards .. 523

————Time—Computation—"By a date fixed"—Meaning—Execution petition—Order on, directing sale papers to be filed "by a date specified"—Dismissal of petition for default on the forenoon of the day specified—Propriety .. 274

————Transfer—Insolvency petition—Transfer of, from file of Sub-Court to Original Side of High Court—Appli-

Presy. Towns Insol. Act, S 7— PAGE

cation for—Maintainability—Civil Procedure Code, S. 24—Letters Patent, Clauses 13 and 18 .. 671

Presidency Towns Insolvency Act (III of 1909), S 7—Garnishee proceedings—Garnishee living outside the jurisdiction of the High Court—Jurisdiction of High Court—Letters Patent (Madras), cl. 12—If governs cl. 18 .. 171

Privy Council—Appeal—Costs of—Taxation by Registrar of—Appeal to Board from — Maintainability — Points not taken before Registrar—Raising of, before Privy Council not permitted .. 711

Pleader — Professional misconduct—Barrister while holding another Barrister's brief, exacting higher fee from client. 296

Provident Funds Act (XIX of 1925), S 3 (1)—Scope of—Deposits in Railway Provident Fund—Insolvent drawing out the same and redeeming the pledge of his wife's jewels with a part of it and paying the balance to her—Right of Official Assignee to the amount .. 38

Provincial Insolvency Act (V of 1920), Ss. 4, 27 and 75 (1)—Order granting extension of time to apply for discharge—Second appeal . 837

———S 4—Purchaser from Official Receiver—Delivery of possession—Application by purchaser for—Maintainability .. 163

———S. 9—Scope of—Substitution of petitioner under — Effect — Creditor whose debt was actionable at original date of petition, but became barred afterwards—Right of, to be substituted 168

———S 17—Creditor's petition to adjudicate debtor as insolvent—Death of debtor before the passing of the order of adjudication—Effect 235

———Ss 28, 2 (d)—Hindu trading family—Insolvency of—Power of manager to dispose of family property for binding debts if vests in Official Receiver—Minors' share—If bound . 721

———S. 78—Suit against insolvent during pendency of insolvency proceedings—Plaintiff whether entitled to exclude the period of pendency of insolvency proceedings .. 661

Public rights and private rights—Conflict between—Processions—Right of community to conduct—Decree of Civil Court declaring—Enforcement of—Duty of Government—Danger to public interest at large by such enforcement—Duty in case of—Court's power to compel enforcement even in such case .. 442

Transfer of Property Act, S. 55. PAGE

Registration Act, Ss. 40 and 2 (10)—Will or authority to adopt in favour of a Hindu minor married girl—Presentation for registration of—Father of a minor—Competency of, to present. 102

———S 77—Competency of person to present document for registration—Objection as to—If can be raised for the first time in appeal .. 102

Specific Performance—Agent—Contract by vendor—Purchaser's suit for specific performance of—Authority of agent—Proof of—Onus on purchaser .. 523

———Suit by purchaser for, with claim for damages for breach of contract additional or alternative—Conversion of, into suit for damages simpliciter—Amendment of plaint for purpose of—What amounts to .. 523

———Suit for—Readiness and willingness of plaintiff to perform his part of contract—Averment and proof of—Necessity .. 523

Specific Relief Act, S. 29—Scope—Specific performance—Suit by purchaser for, with claim for damages for breach additional or alternative—Amendment so as to convert into one for damages simpliciter—Jurisdiction to allow, at hearing—Discretion .. 523

———Part II, Chapter II—Codification—Basis of—English system at the time—Reference to, for interpreting sections in Chapter II, Part II of Act—Permissibility .. 523

Stamp Act (II of 1899), S. 2 (15) and Art 45—Applicability to the Agency tracts—Award directing partition—Stamp duty payable .. 584

Succession Act (1925)—Hindu—Meaning—European or other non-Hindu if can become a Hindu—Proof of European becoming a Hindu and being a Hindu at the time of his or her death—Quantum—Law governing succession to such person—Hindu Law .. 478

———S. 302 [old Act, S 264-B]—Application under—Power and jurisdiction of High Court in—Discretion—Hindu widow—Possession of whole of corpus of estate in default of adoption—Right to—Executor's right to resist .. 517

Transfer of Property Act, Ss. 28 and 30—Condition subsequent—Invalidity of Prior disposition—Effect on .. 42

———S. 55 (2)—Applicability of the Act to sales by operation of law .. 151

Transfer of Property Act, S. 81. PAGE

——S. 81—Applicability and effect—First mortgagee—Suit to enforce mortgage against one item of mortgaged property only—Second mortgagee of that item—Right of, to compel plaintiff to proceed first against other item and to apply to have owner thereof impleaded .. 358

——S 95—Mortgaged property—Purchaser of portion taking assignment of prior mortgages—Rights of—Contribution .. 326

——S. 108 (m)—Fire—Destruction of demised premises by—Lessee's liability—Negligence—Proof of—Necessity for .. 663

——S. 116—Lease for life of lessee—Heirs of lessee continuing in possession after his death—"Agreement to the

Vendor and Vendee. PAGE

contrary"—Payment and acceptance of rent, if amounts to .. 882

Transfer of Property (Amendment) Acts of 1926 and 1927—Retrospective—Signatures of registering officer and of identifying witnesses—If sufficient attestation .. 794

Vendor and vendee—Covenant for sale title—Covenant for indemnity—Distinction—Execution purchaser — Covenant for title in S 55 (2) of Transfer of Property Act included in right and interest of judgment-debtor if passes to—Security bond executed by third party on sale of property undertaking to compensate purchaser with equivalent property in case of his being deprived of property purchased—Enforcement of—Execution purchaser of purchased property—Right of .. 151

PRINTED AT THE MADRAS LAW JOURNAL PRESS, MYLAPORE, MADRAS.